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MARTIN'S MINING CASES

OF

BRITISH COLUMBIA

WITH

STATUTES

BY

THE HONOURABLE MR. JUSTICE MARTIN,

OF THE SUPREME COURT OF BRITISH COLUMBIA,

AUTHOR OF "THE PRACTICE IN CHAMBERS AND TRIALS," ETC., ETC.

VOLUME II., PART I.

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By the same Author

THE

Hudson's Bay Company's Land Tenures

AND THE

Occupation of Assiniboia by Lord Selkirk's Settlers

With a List of Grantees under the Earl and the Company

REVIEWS

MARTIN'S MINING CASES.

ADDITIONAL NOTES TO VOL. I.

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On conflicting mining leases, right of entry, and statutory conditions directory and imperative.

MARTIN'S MINING CASES, VOL. II., PT. 1.

CORRECTION.

Owing to a printer's error in the arrangement of the marginal notes the following corrections should be made. When the volume is completed new pages will be distributed, before binding, to take the place of those in error:—

PAGES.
51-2 —Marginal note at top should be "1903, June 2, MARTIN, J."
70-75—For "Full Court," read "IRVING, J."
76 —For "Full Court," read "HUNTER, C.J."
77-8 —For "Full Court," read "IRVING, J."
96-9 —For "Full Court," read "MARTIN, J."
142-4 —For "Full Court," read "MARTIN, J."
193-4 —For "Argument," read "Judgment at trial, IRVING, J."

[illegible] mining regulations respecting gulch claims, and on amendment.

Ontario Mining Co. v. *Seybold* (1903), A. C. 73; (1902) 32 S. C. 1; (1900) 32 Ont. 301; (1899) 31 Ont. 386.
On title to minerals in Indian reserves, and on Indian title, and on the alienation of Crown lands, and unauthorized acts of departmental officers.

To *Peck* v. *Regnam*, vol. i., p. 30, add this note:—
As to inoperative acts of departmental officers unauthorized by the proper executive, see *Quebec Skating Club* v. *The Queen* (1893), 3 Ex. 387; *Ontario Mining Co.* v. *Seybold* (1903), A. C. 73; (1902), 32 S. C. 1; (1900), 32 Ont. 301; (1899), 31 Ont. 386; *Minister of Public Works* v. *Hart* (1904), A. C. 259; *Newfoundland Steam Whaling Co. Ltd.* v. *Government of Newfoundland*, *Ib.* 399. Where there is a [illegible] description of the coal area applied for and the application [illegible] appropriated thereto, the location of the area cannot be cha[illegible] the Commissioner of Mines: *In re Barrington* (1902), 35 N. S[illegible]

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Grant v. *Acadia Coal Co.* (1902), 32 S. C. 427; (1901) 34 Nov. Sc. 319.
On statutory mining regulations, and negligence.

Briggs v. *Newswander* (1902), 32 S. C. 405; (1901) 8 B. C. 402.
On agreement to sell mineral claims and form company to work, and stock therein. And as a complement to this case see *Briggs* v. *Fleutot*, decided by the Supreme Court on 24th November, 1904 (25 C. L. T. 7; 41 C. L. J. 24), affirming B. C. Full Court (1904), 10 B. C. 309.

The King v. *Chappelle; The King* v. *Carmack; The King* v. *Tweed and Woog* (1904), A. C. 127; (1902) 32 S. C. 587; (1902) 7 Ex. 414.
On Yukon mining regulations, and the publication and constitutionality thereof relating to payment of royalty, and on placer mining licences and grants and right to renewal thereof.

Calgary & Edmonton Ry. Co. v. *The King* (1904), 29 Times L. R. 770; (1904) A. C. 110; (1903) 33 S. C. 673; (1902) 8 Ex. 83.
On the reservation of mines and minerals in Crown grant of land subsidy to railway.

Creese v. *Fleischman* (1903), 34 S. C. 279.
On Yukon mining regulations respecting gulch claims, and on amendment.

Ontario Mining Co. v. *Seybold* (1903), A. C. 73; (1902) 32 S. C. 1; (1900) 32 Ont. 301; (1899) 31 Ont. 386.
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To *Nelson & Fort Sheppard Ry. Co.* v. *Jerry*, vol. i., p. 194, add this note:—

The view expressed herein that the provision requiring security to be given by a free miner before entry upon lands under sec. 10 is for the benefit of the landowner and directory only, and therefore, inferentially, can only be invoked by the landowner, receives confirmation by the case of *Fielding* v. *Mott* (1886), 14 S. C. 254; (1885) 18 Nov. Sc., 339. At p. 346 the right of entry of those holding prospecting licences is recognized. In that case the defendants who successfully set up non-compliance with entry conditions were the owners of the lands over which the plaintiffs obtained mining leases.

Booker v. *Wellington Colliery Co.* (9 B. C. 265):—

The following note on this case appeared at the end of Vol. I, and is reproduced for reference:

1902, *Nov.* 6. On appeal to the Supreme Court of Canada the decision of the Full Court of British Columbia was affirmed, judgment being delivered orally at the close of the argument dismissing the appeal. This case, arising out of an accident in a coal mine, was originally tried by Martin, J., and a special jury at Nanaimo, on December 19 and 20, 1901, and resulted in a verdict for the plaintiff for $1,424. An appeal was taken to the Full Court, and judgment was delivered on June 27, 1902, dismissing the appeal. At the trial the case was given to the jury solely as one of negligence under the Employers' Liability Act in regard to the defendant running a trip of cars down the slope during prohibited hours. The only reason why the case, which is not properly speaking a mining one, is now noticed, is because it might possibly be inferred from some remarks in the judgment of the learned Chief Justice of British Columbia that Rule 11 of sec. 82 of the Coal Mines Regulation Act had been under review at the trial, but though that Rule was referred to yet the course of the trial so shaped itself that it became unnecessary to consider it and therefore the jury were not instructed thereon.

CORRECTIONS TO VOL. I.

Pages 348-359—*Callahan* v. *Coplen*. The year of the Supreme Court judgment (incorrectly given in 30 S. C. R., p. 555, as 1899), should be 1900.

Page 369. For (7 B. C. 1, 305) read (7 B. C. 305).

Page 681. Min. Amdt. Act of 1892, sec. 2, should read "sections 18, 30," etc., instead of "1, 30," etc.

Page 771, line 15 from foot (sec. 39). For "criminal" read "mineral."

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PAULSON v. BEAMAN ET AL.

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November 17.

(32 S. C. 655.)

SUPREME COURT OF CANADA.*

Adverse Action—Map or Plan — Survey — Affidavit—Jurat—Condition Precedent to Right of Action—Provincial Land Surveyor—Oaths Act—Mineral Act, sec. 37 and Amendments.

It is not a condition precedent to a right of adverse action that an affidavit and plan should be filed, as required by the Mineral Act, sec. 37 and Amendments.

Such plan if properly made and signed by a provincial land surveyor need not be based on a survey made by the same surveyor.

The provisions of the Oaths Act, sec. 16, apply to affidavits filed under said sec. 37, and the omission of the date in the jurat is not a fatal defect.

Judgment of the Full Court of British Columbia reversed, and that of MARTIN, J., restored; TASCHEREAU, J., dissenting.

Statement.

APPEAL from the judgment of the Full Court (1 M. M. C. 471; 9 B. C. 184) reversing the decision of the trial Judge, MARTIN, J., and dismissing the plaintiff's action with costs. The facts appear in the prior report and in the judgments which follow. The appeal was argued on October 28th and 29th, 1902.

Argument.

S. S. Taylor, K.C., for the appellant.

Davis, K.C., for the respondents.

Judgment. TASCHEREAU J., dissenting.

TASCHEREAU, J. (dissenting):—I am of opinion that the judgment of the Full Court of British Columbia should be affirmed. The appellant's action was rightly dismissed upon the ground that the map or plan required in an adverse action as a condition precedent by sec. 37 of the Mineral Act of British Columbia, as amended in 1898 and 1899, was not filed by the appellant.

The contention that any surveyor can, upon his oath of office, make a map to be used in a court of justice of any lot of land that he has never seen seems to me untenable. Why would he be required to make a plan at all, if, as Mr. Justice IRVING calls it, a picture by one of the parties would have been sufficient to all intents and purposes,

* *Present*—TASCHEREAU, SEDGEWICK, GIROUARD, DAVIES and MILLS, JJ.

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if the appellant's contention prevailed. An order from the Court to a surveyor to make a plan of certain premises necessarily implies, it seems to me, that the surveyor must make that plan from actual survey or personal inspection of the premises. I would think that this enactment implies the same thing.

I utterly fail to see why the intervention of a surveyor is at all required by the statute, if all that he has to do is to copy one of the parties' sketches and sign it. That sketch would have been as good for the purposes of the statute, without the surveyor's re-copy and signature. When the statute requires a plan made by the surveyor it must mean that the surveyor must make an actual survey. Otherwise his intervention would be futile.

I would dismiss the appeal with costs.

SEDGEWICK, J. SEDGEWICK, J., concurred in the judgment allowing the appeal for the reasons stated by His Lordship Mr. Justice DAVIES.

GIROUARD, J. GIROUARD, J.:—This appeal should be allowed with costs for the reasons given by Chief Justice HUNTER.

DAVIES, J. DAVIES, J.:—Two questions only were argued on this appeal, and both arise out of the proper construction to be given to the thirty-seventh section of the Mineral Act, ch. 135, R. S. B. C. (1897), as amended by sec. 9 of ch. 33 of the statutes of 1898.

The respondents (defendants in the action), contend (1) that under the above section it is necessary for the plaintiff bringing the adverse suit or proceedings to file with the mining recorder a map or plan made by a provincial land surveyor and based upon a prior and actual survey made by him; (2) that the jurat of the adverse affidavit filed with the recorder along with the plan not having been dated makes the affidavit bad, and there has therefore been no compliance with the statute.

The learned Judges in the Courts below were equally divided in opinion, the Chief Justice, who held that a previous personal survey by the land surveyor who made the plan was not necessary, and that the absence of a date in the affidavit was not fatal, agreeing with Mr. Justice MARTIN, who had tried the adverse action, on both points, while Mr. Justice IRVING and Mr. Justice WALKEM held that a previous personal survey was necessary to make the plan a compliance with the statutory requirements.

I concur in the judgment of the learned Chief Justice and think, for the reasons given by him, that this appeal should be allowed. I think it is clear from the wording of the section itself and from the object the Legislature evidently had in view, that no previous actual survey by the land surveyor was contemplated, but only the filing of

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a plan properly made by one presumably competent to make it, namely, a land surveyor. The filing of the adverse writ and the affidavit and plan proved nothing and settled nothing. They simply shewed to the mining recorder the particular claim the plaintiff was making so far as the claim he was adversing or contesting was concerned, and obliged the mining recorder to stay his hand and withhold from the defendants whose claim was being adversed or contested, the certificate of improvements he was demanding under the thirty-sixth section of the same Act.

These papers, then, amounted to nothing more than a caveat which stayed the recorder's hands until judgment in the adverse suit was delivered and filed with him. All this, I think, is quite clear from an examination of the two sections.

It is not necessary to set out the section at length. Its material words, so far as this controversy is concerned, are contained in the amendment of the year 1898. Previous to that amendment, if any person desired to "adverse" or contest a claim being made by any miner for a certificate of improvements, which was practically the equivalent of a Crown grant and could only be impeached for fraud, he had, within certain prescribed times, to begin an action in the Supreme Court of British Columbia and file a copy of the writ in the action with the mining recorder of the district. The amendment required that he should also

> file an affidavit to be made by the person asserting the adverse claim and setting forth the nature, boundaries, and extent of such adverse claim, together with a map or plan thereof signed by a provincial land surveyor, and a copy of the writ, etc.

The section says nothing about an actual survey being made, while the previous section, where it was necessary to deal with the question of survey for the purposes of Crown grants, most clearly requires an actual survey and sets out in detail how it shall be made. The affidavit of the boundaries is not required from the surveyor, but from the adverse claimant himself. To yield to the argument of the respondent, we would require to import into the section language which the Legislature has not used, and impute to it an intention which I do not think it had.

With regard to the absence of the date from the jurat, I do not think that defect a fatal one. The test as to whether or not it is an affidavit is whether an indictment for perjury would lie upon it. The authorities are clear that it would, and evidence as to the time when is was sworn would be admissible *aliunde*.

Even if the absence of the date were a fatal defect at common law in an affidavit, which I controvert, I think that The British Columbia

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Oaths Act (1) and rule 415 of the Supreme Court rules of 1890 of British Columbia cure the alleged defect.

The appeal should be allowed with costs in this court and in the Court of Appeal in British Columbia, and the case should be remitted back to the trial judge to complete the trial of the adverse action.

MILLS, J.:—This case arose from a controversy in respect to a mining claim in the Province of British Columbia. It is situated in the Ainsworth mining division of the province east of Duncan River and north of Dunn Creek.

One John Hastie, on the 15th day of June, 1898, recorded a mineral claim called the "Iron Chief," in the office of the mining recorder at Kaslo. On the 26th day of August, 1898, he transferred to one P. A. Paulson an undivided one-half interest in the said claim, and Paulson by a writing dated the 30th of June, 1899, transferred to the plaintiff this undivided one-half interest in the claim. John Hastie was a free miner of the Province of British Columbia, and so also was P. A. Paulson. On the 22nd of May, 1899, the plaintiff obtained from the mining recorder at Kaslo a certificate of work being done in compliance with the provisions of the Mineral Act for the year ending June the 15th of that year; and on the 15th of June, 1900, the plaintiff paid the mining recorder at Kaslo the sum of $100.

The defendants claim to be the owners of 38.68 acres of the lands and minerals comprised within the said claim which they maintain was located by the defendant Hendrix on the 16th of May, 1899, and recorded at Kaslo on the 1st of June following, named the "Pearl" claim, which embraces 38.68 acres of the mineral claim comprised within the claim known as the "Iron Chief." The plaintiff affirms that they applied for a grant within sixty days after the publication in the British Columbia Gazette of the notice of the defendants that upwards of 38 acres of the said "Iron Chief" mineral claim was comprised in the "Pearl" claim previously located by them.

The plaintiff maintained that the "Pearl" claim has always been an invalid location. It was not marked by two legal posts placed as near as possible on the line of the ledge or vein of mineral; that Hendrix did not blaze or mark the line as required by the Mineral Act; that he did not place a discovery post on the said claim; that he did not furnish the mining recorder the particulars required to be put on posts Nos. 1 and 2; that he did not make affidavit that the legal notices and posts had been put on the claim, nor that the ground applied for was then unoccupied.

(1) R. S. B. C. c. 3, s. 16.

The defendants denied the plaintiff's allegations and affirmed that the "Iron Chief" mineral claim was a nullity. They also deny that the plaintiff's statement of claim discloses a cause of action against the defendants.

The case went down for trial before Mr. Justice MARTIN on the 19th of February last.

It was argued that section 37 of the Mineral Act as amended by the provincial legislature requires that a map or plan made by the Provincial Land Surveyor from a survey and measurement made upon the ground shall be filed with the recorder, and that, in this respect, there has been no sufficient compliance with the statute.

The judges of the British Columbia courts were equally divided upon this question; the Chief Justice and Mr. Justice MARTIN held that the plan must be prepared by the Provincial Land Surveyor, but he might do this from information supplied by the plaintiff, and it need not be from actual survey and measurements made by a competent land surveyor. Mr. Justice IRVING and Mr. Justice WALKEM held the contrary. Mr. Justice IRVING in his judgment said:

> A map to be made by a Provincial Land Surveyor, in my opinion, must be something more than a picture prepared by a Provincial Land Surveyor from data supplied to him by one of the parties to the action. The filing of such a document is not in my opinion within the spirit or letter of the Act.

The Chief Justice says:

> I am of opinion that it is not correct to say either that a plan must be based on a survey by a Provincial Land Surveyor, or that the filing of the affidavit and plan is a *sine qua non* of the right to prosecute the action.

It is proper to look at the provisions of the statute in controversy. By section 36 of the Mineral Act (1) it is provided that, whenever the lawful holder of a mineral claim shall have complied with the following requirements, to the satisfaction of the Gold Commissioner, he shall be entitled to receive from the Gold Commissioner a certificate of improvements in respect of such claim unless proceedings by the person claiming an adverse right under section 37 of this Act have been taken. The lawful holder is required by sub-section (*b*) of section 36 to have

> had the claim surveyed by an authorised Provincial Land Surveyor, who shall have made three plans of the claim, and who shall have accurately defined and marked the boundaries of such claim upon the ground, and indicated the corners by placing monuments or legal posts at the angles thereof, and upon such monuments or posts shall be inscribed by him the name and official designation of the claim, and the corner represented thereby, and who shall have on the completion of survey, forwarded at once the original field notes and plan direct to the Lands and Works Department, &c.

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Now, under section 37, provision is made in respect to an adverse right, and it provides:

> In case any person shall claim an adverse right of any kind, either to possession of the mineral claim referred to in the application for certificate of improvements, or any part thereof, or to the minerals contained therein, he shall within sixty days after the publication in the British Columbia Gazette of the notice referred to in section 36 hereof (unless such time shall be extended by the special order of the court upon cause being shewn) commence an action in the Supreme Court of British Columbia to determine the question of the right of possession or otherwise enforce his said claim, and shall file an affidavit to be made by the person asserting the adverse claim, and setting forth the nature, boundaries and extent of such claim, together with a map or plan thereof made and signed by a Provincial Land Surveyor, and a copy of the writ in said action with the Mining Recorder of the district, or mining division in which the said claim is situate within twenty days from the commencement of the said action, &c.

Now this proceeding is not for the purpose of acquiring any right, but for the purpose of setting out the limits of a mining location already surveyed under section 36, and for the purpose of indicating in what way, and to what extent, it is in conflict with some other claim. If there was no other prior survey under section 36 by one of the parties, he could not under section 37 set up a claim adverse to one who had such claim by obtaining a surveyor to make a plan of a plot which had not been surveyed. It could never have been the intention of the legislature to permit one party who had made a plan, but no survey, to successfully set up a claim under the Mining Act against one who had made both.

The facts in this case not being fully disclosed in the papers before us, I am of opinion that the case should be remitted back to the trial Judge to be tried out before him.

Appeal allowed with costs.

MCNAUGHT V. VAN NORMAN ET AL.

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(32 S. C. 690.)

Mineral Claim—Interest of Co-owner—Free Miner's Certificate, Lapse of—Right to Renew—Sheriff—Execution—Judgment—Mineral Act, sec. 9, and Amendment of 1899, sec. 4.

A sheriff in possession of a free miner's interest in a mineral claim has no power on behalf of a judgment creditor to take out a special free miner's certificate, under sec. 4 of the Mineral Act Amendment Act of 1899, in the name of the owner of the interest under seizure; neither has the sheriff power to renew a certificate before lapse.

Where one of the co-owners of a mineral claim allows his free miner's certificate to lapse, his interest at once vests *pro rata* in the remaining co-owners.

Decision of IRVING, J., affirmed.

Decision of the Full Court of British Columbia affirmed, SEDGEWICK, J., dissenting.

Statement.

APPEAL from the judgment of the Supreme Court of British Columbia, Full Court (1 M. M. C. 516; 9 B. C. 131), affirming the judgment of IRVING, J., on the trial of an interpleader issue declaring that the plaintiff was entitled to the interest in the mineral claims in question as against the defendants.

On the 29th of March, 1901, a seizure was made by the sheriff on executions issued by a number of creditors against a free miner named McKinnon of an undivided one-fourth interest in the "Hampton Group" of mining locations in the Slocan Mining Division, in British Columbia, held by McKinnon in co-ownership with the plaintiff, also a free-miner. McKinnon's free-miner's certificate lapsed, on failure of renewal, on the 31st of May, 1901, and the plaintiff claimed that, thereupon, McKinnon's interests became absolutely vested in him as the co-owner of the claims under the provisions of the "Mineral Act" as amended by the "Mineral Act Amendment Act, 1899." On the 5th of June, 1899, the defendants, through the sheriff, procured the issue of a special free miner's licence in McKinnon's name and it was claimed on their behalf that, thereby, the interest seized had become revived, under the provisions of section 4 of the Act of 1899, and re-vested in the execution debtor subject to the executions.

On the trial of the interpleader issue the plaintiff was declared to be the owner of the interests in dispute as against the defend-

* *Present*—TASCHEREAU, SEDGEWICK, GIROUARD, DAVIES and MILLS, JJ.

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ants, and this appeal is asserted against the judgment of the full Court affirming that decision.

The questions raised on the appeal appear from the prior report and judgments now reported. The appeal was argued on Oct. 31st, and Nov. 3rd, 1902.

Argument.

Peters, K.C., and *Lennie* for the appellants.

S. S. Taylor, K.C., for the respondent.

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Judgment, TASCHEREAU, J.

The judgment of the majority of the Court was delivered by:

TASCHEREAU, J.:—I would dismiss this appeal. It seems to me incontrovertible, first, that McKinnon's certificate lapsed on the thirty-first day of May, 1901; secondly, that thereupon (if section 9 means what it says), his interest in that claim became vested in McNaught, his co-owner, leaving the seizure out of question for the present; and thirdly, that McKinnon had not, thereafter, at any time, the right by taking a special free miner's certificate to re-vest the title in himself.

But, would contend the appellants, though McKinnon had lost all his interest in that claim, yet the previous seizure of it we had caused to be made in execution of our judgment against him had the effect of keeping that interest in him, or of giving us the right to revive it after it had ceased to exist, so that it never passed to McNaught, or, if it passed, it re-vested in us as execution creditors of McKinnon, upon our taking out a special free miner's certificate five days after the lapsing of his certificate. That contention cannot prevail, in my opinion.

Section 4 of the Act of 1899 enacts that any one who allows his free miner's certificate to expire may, under certain conditions, obtain a special free miner's certificate which will have the effect of reviving his title to all mineral claims which he previously owned, either wholly or in part, except such as, under the provisions of the Mineral Act, had become the property of some other person at the time of the issue of such special certificate.

Now, I entirely fail to see why the exception in that clause does not cover McNaught's case. Whenever anyone else but the Crown (for if applied to the Crown the enactment would be nugatory, a special certificate could never be issued) has by the operation of the statute become the owner of the title, the first owner has no right to a special certificate and to a revival of his lost ownership. That is what the statute unequivocally says. Now, here, McNaught had, by the operation of the statute, become the owner of McKinnon's interest; consequently, the execution creditors had no more right to a special free miner's certificate than McKinnon himself would have

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had. They had the right to seize it at the time they did, but that right was a defeasible one, as their debtor's was. Their seizure could not give it more vitality than it had in their debtor's hands nor prolong its duration beyond the period affixed to it by the statute. He could not have given a non-defeasible lien; and the appellants, likewise, cannot have secured a non-defeasible lien by their seizure. Had they renewed the certificate on or before the thirty-first of May, assuming their right to do so, McNaught would have had no right to McKinnon's interest. But they did not do so, and that is not the case before us.

The words "wholly or in part" in section four of the Act of 1899, whatever construction they are susceptible of, cannot be read as defeating the clear, unambiguous enactment of section nine, that, when a co-owner's interest lapses by his failure to keep up his certificate on the thirty-first day of May of each year, his interest is not forfeited to the Crown, nor to be considered as abandoned, but that it shall, *ipso facto*, be and become vested in his co-owners.

The appellants in one branch of their arguments at bar did not seem to controvert the proposition that McKinnon's interest passed to McNaught, but they argued that this interest was then subject to their execution as a lien upon it. That is the same question over again. McKinnon's whole interest came to an end by the operation of the statute on the thirty-first of May. The eventuality provided for by the statute upon which his interest passed to McNaught having happened, the appellants who had seized that interest, knowing then of this possible eventuality, had seized it subject to it. If the sheriff had sold, had it been possible, before the thirty-first of May, would not the purchaser's share, had he failed, as McKinnon did, to renew on the thirty-first of May, have passed to McNaught? Clearly so, it seems to me. Now why? Because the sheriff had sold a defeasible right. Then, how can it be argued that he had seized anything else than a defeasible right?

SEDGEWICK, J. dissenting.

SEDGEWICK, J., dissenting.—I regret to have to differ from my brothers in this case. In my view the obvious, as often happens, has been overlooked, and, as a consequence, the vested interests of the judgment creditors have, by an erroneous interpretation of the Mineral Act and the Execution Acts of British Columbia, been confiscated and transferred to the respondents who have paid nothing for them and who have no more right to them than I have.

I admit that under the Mineral Act no one but a free miner can take or hold an interest in a mineral claim, but I contend that under the Execution Act, a judgment creditor having levied and seized through the instrumentality of a sheriff under execution against the interest of a judgment debtor (being then a free miner),

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in a mineral claim that creates an interest or ownership in a mineral claim which is not forfeited or destroyed or transferred to co-owners of other interests upon the subsequent loss of the judgment debtor's status by reason of his default in not renewing his free miner's certificate.

Section nine of the Mineral Act, so far as it relates to this case is as follows:

9. Subject to the proviso hereinafter stated, no person or joint stock company shall be recognized as having any right or interest in or to any mineral claim, or any minerals therein, or in or to any water-right, mining ditch, drain, tunnel or flume, unless he or it shall have a free miner's certificate unexpired. And, on the expiration of a free miner's certificate, the owner thereof shall absolutely forfeit all his rights or interests in or to any mineral claim, and all or any minerals therein, and in or to any and every water-right, mining ditch, drain, tunnel or flume which may be held or claimed by such owner of such expired free miner's certificate, unless such owner shall on or before the day following the expiration of such certificate, obtain a new free miner's certificate;

Provided, nevertheless, should any co-owner fail to keep up his free miner's certificate, such failure shall not cause a forfeiture or act as an abandonment of the claim, but the interest of the co-owner who shall fail to keep up his free miner's certificate, shall, *ipso facto*, be and become vested in his co-owners *pro rata*, according to their former interests;

Provided, nevertheless, that a shareholder in a joint stock company need not be a free miner, and, though not a free miner, shall be entitled to buy, sell, hold or dispose of any shares therein;

And provided, also, that this section shall not apply to mineral claims for which the Crown grant has been issued.

And section 12 of the Mineral Act is as follows:

12. Any interest which a free miner has in a mineral claim before the issue of a Crown grant therefor, or in any mining property as defined in the Mineral Act, and any placer claim and mining property, as defined in the Placer Mining Act, may be seized and sold by the sheriff, under and by virtue of an execution against goods and chattels.

The Mineral Act does not give a definition of the word "owner" as many English Acts do, but it provides that the words "mineral claim" shall mean the "personal right of property or interest in any mine."

It does not appear difficult to me to place a reasonable and proper construction upon clause nine of the Mineral Act. It provides for two classes of cases. First, where a free miner having a sole and absolute interest in a mineral claim, no other person, partnership, or company having any title to or any incumbrance, charge, or lien on, or other interest in it or any part thereof, allows his certificate to lapse. In that case, his absolute and undivided interest (or ownership, if you will), is forfeited to the Crown and the area, which theretofore formed the mineral claim, becomes again vacant land of the Crown. And secondly, inasmuch as the Crown is not solicitous of co-ownership or co-tenancy or co-partnership or co-interests with any

of His Majesty's denizens or subjects in a mineral claim, inasmuch as such joint interests might in many possible and even probable cases lead to conflict and litigation between the Sovereign and his people, it was provided that

should any co-owner fail to keep up his free miner's certificate, such failure shall not cause a forfeiture, or act as an abandonment of the claim, but the interest of the co-owner who shall fail to keep up his free miner's certificate, shall *ipso facto* be and become vested in his co-owners *pro rata* according to their former interests.

Now what, upon his loss of status—his ceasing to be a free miner—becomes vested in his co-owners? Only the interest in the claim which at the time of his loss of status he had—no more, no less.

What was that interest?

He had, previously, at the time of the levy and seizure by the sheriff before referred to, the part interest in the respective mineral claims as set out in the pleadings and evidence. That was the interest which, under section 12 of the Execution Act, the sheriff, by virtue of an execution issued against the goods and chattels of the judgment debtor—then the holder of the interests mentioned—seized and had a right in due course to sell.

(It was on the 29th of March, 1901, that the seizure was made, and on the 31st of May following the judgment debtor's free miner's licence expired.)

The effect of the sheriff's seizure was to diminish the interest of the judgment debtor or to charge that interest with the amount of the judgments together with subsequent costs and expenses. The interest of the judgment debtor became charged with these sums and if, after this but before his loss of status, he had voluntarily sold his interest, as he might have done, to a free miner, the purchaser could only take subject to the satisfaction of the judgment creditors' claims. So that the value of the judgment debtor's interest, after the seizure, was its value before the seizure minus these claims. And I submit that it was that lesser and diminished interest alone which under the ninth section of the statute passed to the co-owners *pro rata* in proportion to their former interests.

Then to whom does the defaulting co-owner's (the judgment debtor's), interest go? I answer—To all co-owners of any interests in the claim. They may be absolute transferees or mortgagees or holders of any lien or charge on the lapsed interest of the disenfranchised free miner. They each are owners of his former interest *pro rata* according to their former interests, and the judgment creditors will participate accordingly.

It was admitted at the argument that if, before the seizure, McKinnon had absolutely transferred his interest to a free miner, it

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made no difference to the latter whether he, McKinnon, renewed or did not renew his certificate. It could I think be admitted, too, that had the sheriff sold to a free miner before McKinnon lost his status the purchaser would take. Any other contention would be absurd. I, a free miner, buy from the sheriff or a free miner the latter's interest in a mineral claim. Am I, in order to hold my claim, obliged to see that the man whose interest I bought continued to be a free miner for ever?

But it is said that McKinnon did not transfer to anybody. I think he did. In this respect there is no difference between a voluntary and an involuntary alienation. His submitting to a judgment and execution against him and to the sheriff seizing his interest is equivalent to a voluntary charging or hypothecation by him and, as the Execution Act authorises the sheriff to seize and sell his interest, it is just as if he had sold his interest to the sheriff and the sheriff, though not a free miner, sold it to one who was.

To conclude, I affirm that no interest which the holder of a mineral claim has, whether voluntarily or involuntarily parted with to another—entitled to receive it—can be deemed or considered, under section nine of the Mineral Act, as other than the interest of that other and, therefore, cannot be confiscated upon the transferee's loss of his status as a free miner. Sections 32, 34, 43 and 50 of the Mineral Act all throw light on the questions I have here discussed.

Appeal dismissed with costs.

NOTE.—See *Woodbury Mines Ltd.* v. *Poyntz*, *post*, p. 76.

McKELVEY v. LE ROI MINING CO., LTD.

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(32 S. C. 664.)

Mines (Metalliferous) Inspection Act—Employers' Liability Act—Accident to Miner caused by Falling Cage—"Falling Material"—Bulkhead—Pentice—Statutory Duty of Owner—Negligence—Proximate Cause—Practice—R. S. B. C. 1897, ch. 134, sec. 25, rule 20, and Amendment of 1899, sec. 12—Appeal—New Point on—Jurisdiction.

Apart from the question of statutory obligation under sec. 25, sub-sec. 20 of the Inspection of Metalliferous Mines Act, on which the Supreme Court of British Columbia founded its judgment dismissing the action, the finding of the jury supported an action of negligence under the Employers' Liability Act.

Per MILLS J.—The Court below was right in holding that the statutory provisions had been complied with.

A question of law appearing upon the record, but not raised in the Courts below may, if no evidence in rebuttal could have been brought to affect it had it been taken at the trial, be taken for the first time before the Supreme Court of Canada.

An objection that the trial judge had no jurisdiction to deliver judgment from which an appeal was taken is not one which may be taken to the jurisdiction of the appellate court to entertain the appeal.

Decision of the Full Court of British Columbia reversed.

Statement.

APPEAL from the judgment of the Supreme Court of British Columbia (1 M. M. C. 477; 9 B. C. 62), affirming the judgment of the trial Judge, McColl, C.J., dismissing the plaintiff's action with costs.

The action was to recover damages for personal injuries sustained by the plaintiff while working in the defendants' mine at Rossland, B.C., known as the Le Roi Mine. The facts are stated in the prior reports and judgments now reported.

At the trial the following questions were left to the jury: (1) "What was the immediate cause of the injury?" (2) "If the plaintiff is entitled in law to damages, at what amount do you assess the same?"

The jury returned the following answers: (1) "That the approximate cause of the injury was the non-continuance of the guide-rails which, in the opinion of the jury, caused the safety-clutches to fail in their action and, therefore, allowed the cage to fall;" (2) "Three thousand dollars."

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*Present:—TASCHEREAU, SEDGEWICK, GIROUARD, DAVIES and MILLS, JJ.

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The learned Judge did not direct any judgment to be entered, but left the parties to move before the Full Court as they might be advised, and a motion and cross-motion were accordingly made by the plaintiff and defendants, respectively.

After hearing the motions the Full Court gave judgment declaring that it had no jurisdiction to hear the motions and giving the parties liberty to move before the Chief Justice as they might be advised. Subsequently, on a motion to enter judgment made by the plaintiff, the Chief Justice ordered judgment to be entered dismissing the action with costs, as already reported. This judgment was affirmed by the decision of the Full Court now under appeal.

On the appeal coming on for hearing on Nov. 3rd-4th, 1902,

Argument.

Daly, K.C., for the respondents, moved to quash the same on the ground that McColl, C.J., had no jurisdiction to hear the case a second time, and also objected that questions of law not raised in the Courts below could not now be relied upon for the first time before this Court, as apparently intended by the appellants, and taken in their factum. *Ex parte Firth, In re Cowburn* (1882), 19 C. D. 419, was cited.

The ruling of the Court on these objections was as follows:

Judgment on motion.

Per Curiam.—That the Chief Justice of British Columbia had no jurisdiction to hear the case is, upon the face of it, not an objection to our jurisdiction. If the Chief Justice had no jurisdiction, that would be a reason to set aside his judgment in favour of the respondents, but it is not an objection to our jurisdiction to entertain the appeal.

The established practice of this Court on the second point is stated by our present Chief Justice in *Gray* v. *Richford* (1878), 2 S. C. 431, at page 456, and this is also the practice followed in the Privy Council. See also in the Privy Council, the case of *Scott* v. *The Phoenix Assurance Company*, Stu. K. B. 354. We therefore, on an appeal, cannot refuse to entertain questions of law appearing upon the record although they may not have been raised in the Court below and are relied upon for the first time here, where no evidence could have been brought to affect them had they been taken at the trial.

Motion dismissed with costs.

Argument.

The appeal was then heard upon the merits. The questions then at issue are stated in the judgments reported.

Aylesworth, K.C., and *A. H. MacNeill*, K.C., for the appellant.

Daly, K.C., for the respondents.

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TASCHEREAU, J.—I concur in the judgment allowing the appeal with costs and granting the appellant's motion for judgment with costs for the reasons stated by His Lordship Mr. Justice Davies. The Courts of British Columbia were wrong in disregarding the verdict of the jury.*

TASCHEREAU, J.

SEDGEWICK, J., concurred in the judgment allowing the appeal for the reasons stated by His Lordship Mr. Justice Davies.

SEDGEWICK, J.

GIROUARD, J.—I am inclined to allow the appeal. I think there is some evidence in support of the verdict of the jury that the

GIROUARD, J.

approximate cause of the injury was the non-continuance of the guide-rails which, in their opinion, caused the safety-clutches to fail in their action, and thereby allowed the cage to fall.

The witness Hughes, one of the miners working on the railway, says:

A. The safeties are arranged that when the rope breaks loose they are supposed to turn to and catch the guide-rails.

Q. When the cage is attached the safeties are open?

A. Yes, and when it breaks loose they close and catch.

Q. They turn automatically and catch on the guide-rails?

A. Yes.

Q. So that, when there is no guide-rail at the point at which the rope breaks, what becomes of the safeties?

A. They are useless.

Q. This cage was fitted with safeties?

A. Yes, sir.

Q. But having fallen from a place where there were no guide-rails the safeties would not act?

A. No, sir.

* * *

Q. You say that you think the safeties would probably have acted if the guide-rails had been there?

A. Yes, they would have had more of a chance.

Even the trial Judge found that there was no dispute as to the evidence in respect to the guide-rails. I do not feel, therefore, inclined to disturb that verdict, and there being evidence of negligence at common law the company should be held liable and condemned to pay the sum of three thousand dollars, being the amount of the damages assessed by the jury, the whole with interest and costs.

DAVIES, J.—This action was brought to recover damages for injuries sustained by the appellant, a workman, while engaged in the defendants' mine. The injuries sustained were serious and the jury assessed the damages at three thousand dollars.

DAVIES, J.

* See note at end.

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The plaintiff was working in company with other miners at the bottom of a large shaft, referred to as a five-compartment or combination shaft, and was engaged in sinking this shaft so that a depth of nine hundred feet should be reached. At the time of the accident the shaft was about forty to forty-six feet below the eight hundred foot level. The mine was operated down to the eight hundred foot level by means of two cages which were in the two westerly compartments of the shaft. There were no cages in the three other compartments. Drifts had been opened out from the shaft at the three hundred and fifty, five hundred, six hundred and seven hundred foot levels, both east and west, and from the east at the eight hundred foot level, and ore was being "stoped" and general mining carried on from all these levels. A platform had been placed in the westerly compartment of the shaft over the eight hundred foot level and the place where the plaintiff and others were working was underneath this platform, some forty or fifty feet. The plaintiff was injured by the fall of the iron cage operated in the westerly compartment, from the sheave wheel at the top of the shaft down to the eight hundred foot level, where it struck and smashed through the platform constructed there and fell down upon the plaintiff.

At the time of the accident the cage which fell was being used for bringing timber to the six hundred foot level and hoisting waste rock therefrom.

It is not contended that the platform was built or intended as a protection against the fall of so heavy an article as the iron cage. It was only intended to protect the workmen from any ordinary material, such as pieces of rock or ore, falling down the shaft from the sides or from the several tunnels and, in the event of the cage falling from the breaking of the rope which was attached to it and by which it was raised and lowered, unless its fall was prevented by the dogs or safeties with which it was provided seizing and holding the guide-rails, there was no protection of any kind for these workmen at the bottom of the shaft.

At the trial the plaintiff contended, amongst other reasons, that the defendants were liable because they had failed to comply with the provisions of The Inspection of Metalliferous Mines Act, as amended by The Inspection of Metalliferous Mines Act Amendment Act, 1899.

Section twenty-five of the principal Act, ch. 134, is as follows:

The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies.

(20) Each shaft, incline, stope, tunnel, level or drift and any working-place in the mine to which this Act applies shall be, when necessary, kept securely timbered or protected to prevent injury to any person from falling material.

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By the Act of 1899, ch. 49, sec. 12, it was enacted as follows:

Sub-section 20 of said section 25 is hereby amended by adding thereto the following:

No stope or drift shall be carried on in any shaft which shall have attained a depth of two hundred feet unless suitable provision shall have been made for the protection of workmen engaged therein by the construction of a bulkhead of sufficient strength, or by leaving at least fifteen feet of solid ground between said stope or drift and the workmen engaged in the bottom of the shaft.

It was conceded that fifteen feet of solid ground had not been left in the body of the shaft in the nature of a pentice. And also that the bulkhead or platform which had been put in at the eight hundred foot level was insufficient to protect against a falling cage. And also that, had the fifteen feet of solid ground (the pentice), been left, the accident would have been prevented; that the shaft was more than two hundred feet in depth, viz., eight hundred and forty-six feet, and that stoping or drifting was carried on in the shaft.

The learned Chief Justice was of opinion that these statutes did not govern or apply to this case, that the cage of the hoist could not be regarded as "falling material" within the sense of these words as used in section twenty-five above quoted, and that the amendment of 1899, though somewhat indefinite in its language, did not mean that fifteen feet of solid ground or a sufficient bulkhead in lieu thereof should be left or constructed within the shaft itself as a protection to the workmen, but that the proper construction of this section is that, in the event of the owner of a mine wishing to drift or stope ore on any side of the shaft that he shall leave for the protection of the workmen in the shaft a solid pillar of rock at least fifteen feet deep, so as to constitute a wall of the shaft, lying between the shaft and the stope or drift, or, in the event of such pillar of rock being ore of a very high grade and his desiring to make use of the same and to recover the precious metal therefrom, that he is then at liberty to replace the same by bulkheads of timber which would form a solid wall for the shaft sufficient to withstand the vibrations caused by the work and blasting necessary for the drifting and stoping; and that the evidence showed compliance on the defendants' part with the section as so construed.

At the close of the plaintiff's case, and again when the evidence was all in, the defendants moved for a nonsuit on the grounds that there was no evidence to go to the jury of any defect in the ways, works or machinery for which they were liable at common law or under the statutes regulating their operations, and that the evidence shewed the accident to have been caused by the negligence of a

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fellow-workman of the plaintiff, the engineer who had the control of the working of the cage, and for which they were not liable.

The learned Chief Justice who tried the case refused to non-suit, holding that the only point open was whether there was negligence on defendants' part in not continuing the guide-rails up to the wheel sheave. He submitted the following question to the jury:—

What was the immediate cause of the injury?

To which the jury returned answer:

The approximate cause of the injury was the non-continuance of the guide-rails, which, in the opinion of the jury, caused the safety-clutches to fail in their action and, therefore, allowed the cage to fall.

The learned Chief Justice declined to order any judgment to be entered on this verdict and on application being made to the Supreme Court to enter a verdict on the jury's findings for one party or the other, that Court decided that it had no jurisdiction to do so and remitted the cause back to the Chief Justice, who thereupon directed judgment to be entered dismissing the plaintiff's action. From this judgment an appeal was again taken to the Supreme Court of British Columbia, which affirmed the Chief Justice's judgment, and from this latter judgment an appeal was taken to this Court.

We have not had the advantage of having the reasons for the judgment delivered by the Chief Justice, entering the judgment for the defendants, and those of the Full Court are very meagre.* They turned almost, if not entirely, upon the true construction to be given to the twenty-fifth section of the Inspection of Metalliferous Mines Act, and the amendment to the twentieth sub-section of that section enacted in 1899, Mr. Justice Irving expressing himself as "not feeling any great degree of confidence in the correctness of the construction placed upon that section by the Chief Justice," but, on the other hand, being "unable to say that he was wrong," and Mr. Justice Martin adhering to the decision that he had given when the case came first before the Full Court, that neither the twenty-fifth section of the Act above referred to nor its amendment in 1899 applied to the facts of the case.

In the view I take, however, of the whole case it is unnecessary to express any opinion as to what is the true construction of that section or its amendment.

The jury have found that the proximate cause of the injury to the plaintiff was the defective construction and condition of the guide-rails along which the cage ran, in their non-continuance to the sheave-wheel, "which caused the safety-clutches to fail in their action and, therefore, allowed the cage to fall."

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* See note at end.

If there was any evidence which could properly sustain this finding then it is clear that the defendants are liable at common law, and quite irrespective of the statutes, for the injury sustained by the plaintiff. The substance and meaning of the finding of the jury are that the accident was due to the neglect of the defendants to take proper precautions for the protection of their employees from the possible consequences of a failure to provide machinery and appliances fit and proper for the working of the cage. Such neglect would clearly render them liable at common law for injuries sustained by any of their workmen and of which it was the proximate cause. The exact nature of this neglect is found by the jury to be the non-continuance of the guide-rails up to the sheave-wheel fixed in the timbers set in the shaft about sixty feet above the three-hundred-and-fifty-foot level or tunnel from which the cage was operated and around or through which sheave-wheel the rope attached to and guiding the cage ran. The necessity for such a continuance of the guide-rails was a pure question of fact and especially one proper for the jury to find.

It was admitted, on both sides, that the guide-rails did not run up to the sheave-wheel but stopped about twelve or twenty feet below it. This cage was operated from what was called the three-hundred-and-fifty-foot tunnel or level. The shaft was an inclined one, about seventy-four degrees from the horizontal, and the cage ran on rails resting on wall or shaft timbers. In addition to the rails there were what were called guides to assist the rails and, in case of necessity, for the cage-safeties to work upon. These safeties were appliances attached to the cage for the purpose of stopping it in case the rope, which held and guided the cage, and which passed around the sheave-wheel, broke. This sheave-wheel was fastened to timbers in the shaft about sixty or sixty-five feet above the three-hundred-and-fifty-foot tunnel, called by the witnesses the Black Bear Tunnel. These guide-rails ran up above the tunnel and towards the sheave-wheel, a distance variously estimated at from thirty-seven to fifty feet. There remained, therefore, between the place where the guide-rails ended and the sheave-wheel, a space without guide-rails variously estimated at from ten to twenty feet; and if the cage ran up to the sheave-wheel, and the rope broke, there would be nothing for some distance on which the so-called safeties could operate and the cage must necessarily fall at any rate till it struck the guide-rails.

It was contended on behalf of the plaintiff, that this was just what happened at the time of the accident, and that, owing to the absence of guide-rails, the falling cage, weighing over a ton, obtained such an impetus before it reached the place where the guide-rails began, that the dogs or safeties on the cage were unable to act and were reversed and broken and so the cage fell to the bottom.

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The superintendent of the defendants' mine, Mr. Long, in his examination, explaining the methods of operating the cage and the uses of the guide-rails, and dogs or safeties, stated that the guide-rails were continued up within ten or twelve feet of the sheave-wheel, and that they are used for steadying the cage and for the cage-dogs or safeties to work upon, but that he did not think, if these rails had been continued up to the timbers on which the sheave-wheel was set, it would have prevented the cage or skip from falling.

Other witnesses called for the defence expressed the same opinion and placed the blame for the accident upon the engineer running the cage. Munro, on the other hand, who was one of the stationary engineers of the mine, stated that it was customary to run guide-rails as far up as the skip or cage could run, and that, if it was not done, he did not know of any other appliance in use which could prevent accident in case the rope broke. He stated that, in his opinion, it was necessary they should run to the top in order to be a safeguard. Other witnesses gave similar testimony, stating, what is in fact almost self-evident, that without these guide-rails at any particular point the safeties are useless.

A large mass of testimony pro and con, in support of the rival contentions of the parties, was given, and now that the jury have found that the absence of the guide-rails at the top was the proximate cause of the accident, and of the plaintiff's injuries, we are asked to set the finding aside and to sustain the judgment of the Court below entering judgment for the defendants.

As I have already remarked, the question as to whether or not the finding of the jury should be set aside does not appear to have been argued in the Court below, and no reference is made to this branch of the case in the reasons for their judgment given by the learned Judges.* The whole case turned upon the application of the sections of the Inspection of Metalliferous Mines Act and its amendment to the case, and the Court, agreeing with the Chief Justice, held that they were not applicable.

The more recent authorities on the rule with respect to setting aside the findings of a jury have been considered in a case lately decided in this Court and we have determined, in accordance with these authorities, that before doing so the Court must be satisfied that the finding is one which the jury, viewing the whole evidence, could not properly find. In such a case only should the finding be interfered with.

I am of opinion, after careful examination of the evidence in this case, and for the reasons hereinbefore stated, that the jury's finding is not one which, under this rule, we ought to interfere with.

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* See note at end.

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That would appear to me to end the case. It is not denied that, as a matter of law, a master who employs a servant in work of a dangerous character, such as in mining at the foot of a shaft eight hundred feet deep, is bound to take all reasonable precautions for the workman's safety. In this case the proximate cause of the accident is found to be the defendants' neglect to do so in an important particular.

The finding standing, the appeal should be allowed with costs in all the Courts, and judgment entered accordingly.

MILLS, J.

MILLS, J.—In this case the plaintiff was working at the bottom of a mining shaft upwards of 800 feet in depth. The cage which was used for raising the product of the mine and for the ascent and descent of the men employed fell, from the breaking of the cable at the sheave-wheel, upon the timbers in the shaft through which it passed, and seriously injured the plaintiff. There were guide-rails along which it ran which extended to within thirty feet of the sheave-wheel. The engineer in charge had carelessly run up the cage to the sheave-wheel quite above the guide-rails, and this seems to have been done with so much violence as to break the cable, so that it fell all the way to the bottom of the shaft. It fell several feet before it reached the guide-rails, and had thereby acquired so much momentum that the safeties which were intended to check its downward progress were bent back and no longer served the purpose for which they were intended.

There are certain provisions of the Act known as the Inspection of Metalliferous Mines Act, which are intended to prevent persons working in the bottom of a shaft from being injured by falling material, and an attempt was made during the argument to show that proper precautions had not been taken in this regard. But it was pointed out by Mr. Daly, the counsel for the company, that the provisions of the Act were in this regard sufficiently complied with. The law requires that the workmen in the shaft shall be protected against falling material; that where mining operations are being carried on away from the shaft there would be danger arising from rock or mineral being blown out and falling down unless there was a protecting wall of solid ground or the construction of a bulkhead above the workmen of sufficient strength to guard against falling material. In this case, from the carelessness of the engineer in running up the cage, which weighed about two tons, much further than was necessary, the cable was broken and the cage precipitated to the bottom of the shaft. The trial Judge was of opinion that the accident was wholly due to the carelessness of the engineer, but the jury were of opinion that the company had failed in their duty in not extending the guide-rails as high up as it was possible for the cage to go.

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There is no doubt that had the guide-rails been so extended the accident might not have happened, and men employed in such dangerous operations as there are in mines are entitled to all the protection which can be reasonably given them.

I cannot say that the finding of the jury is not one which the evidence did not warrant, and I think, therefore, that the verdict ought not to be disturbed.

Appeal allowed with costs.

NOTE.—Leave to appeal was refused, Feb., 1903.

The reason why neither the Full Court of British Columbia nor the defendant's counsel dealt with the question of the defendant company's liability under the Employers' Liability Act is because that branch of the appeal was deliberately abandoned by the appellant's counsel in answer to a question from the Court on that head—see prior report, Vol. I., p. 479. This fact was evidently not brought to the attention of the Supreme Court of Canada by the respondent's counsel, who was not before the Full Court, otherwise the abandoned ground could not have been entertained, for, as the House of Lords said in the late case of *McCartney* v. *Londonderry and Lough Swilly Railway* (1904) A. C. 301, "the appellant must be held to the concession made on his behalf." And to the same effect see *Hamelin* v. *Bannerman* (1901), 31 S. C. 534. The result is that not only has the decision of the Full Court not been disturbed on the question of statutory compliance, but it has been affirmed by Mr. Justice Mills.

For other cases on this Act, see *Stamer* v. *Hall Mines* (1899), 1 M. M. C. 314; 6 B. C. 579; *McDonald* v. *Can. Pac. Explor. Co.* (1899), 1 M. M. C. 379, 7 B. C. 39; *Hosking* v. *Le Roi* (No. 2), *post*, p. 100; and cf. *Gunn* v. *Le Roi Mining Co.*, *post*, p. 53; and *Hastings* v. *Le Roi* (No. 2), *post*, p. 81; *Leadbeater* v. *Crow's Nest Pass Coal Co.*, *post*, p. 145.

HARTLEY v. MATSON.

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(32 S. C. 644.)

SUPREME COURT OF CANADA.*

Yukon Placer Mining Regulations of 1898—Lease—Grant—Claim—Status of Claim Owner.

Where a placer miner has staked a claim on ground held under an existing hydraulic lease, but has not obtained the usual grant for such claim, he has no status to attack said lease.
***Quaere.*—Even if he has obtained such grant, should the Attorney-General be a party to an action against the leaseholder?**
Judgment of the Territorial Court of the Yukon affirmed.

Statement.

APPEAL from the judgment of the Territorial Court of the Yukon Territory sitting as the Court of Appeal constituted by the Ordinance of the Governor-General-in-Council of the 18th of March, 1901, respecting the hearing and decision of disputes in relation to mining lands in the Yukon Territory, which affirmed the decision of the Gold Commissioner dismissing the plaintiffs' action with costs.

In this case the respondents' motion to quash the appeal on the ground of want of jurisdiction was dismissed (1902) 32 S. C. 575, and the questions in issue on the merits are stated in the judgment of His Lordship Mr. Justice Davies now reported.

Argument.

The argument was heard on Nov. 8th, 1902.

Peters, K.C., for the appellants.

Latchford, K.C., and *J. Lorne McDougall* for the respondents.

Judgment, TASCHEREAU J.

TASCHEREAU, J.—I entirely agree with Mr. Justice Davies in his conclusions and the reasoning upon which he has reached those conclusions.

SEDGEWICK, J. GIROUARD, J.

SEDGEWICK and GIROUARD, JJ., concurred in the judgment dismissing the appeal with costs for reasons stated in the judgment of His Lordship Mr. Justice Davies.

DAVIES, J.

DAVIES, J.—This is an action instituted by the appellants in the Gold Commissioner's Court of the Yukon Territory for the purpose of obtaining a judicial declaration that certain placer mining claims alleged to have been staked by them were not within the boundaries

* *Present:*—TASCHEREAU, SEDGEWICK, GIROUARD, DAVIES and MILLS, JJ.

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of the defendants' hydraulic mining lease, and that such lease was "null and void," and should be cancelled. This latter is the leading conclusion of the plaintiffs' claim, their other claims being consequential merely and depending upon their right to have the lease cancelled.

The only question argued before us, and on which this appeal must be determined, was whether the plaintiffs had any status entitling them to have such declaration made in this action, or whether they were mere volunteers without interest. This case came before the Territorial Court of Appeal and comes before us practically as if on demurrer, and the appellants have a right to have the statements of fact alleged in their statement of claim assumed as true.

The claim of the plaintiffs', about sixty in number, is based upon the statement, which must be assumed as true, that they are free miners, and that, in 1901, they duly staked certain placer mining claims on the left limit of Bonanza Creek and duly applied at the Gold Commissioner's Office for grants of the same. There is no statement that any such grants were given, but on the argument it was common ground on both sides that their applications had all been rejected because of the existence of the respondents' lease. The Gold Commissioner has full jurisdiction under the regulations to

> hear and determine judicially all matters in difference in regard to entries for mining claims under the regulations,

and power to adjudge any patent or lease from the Crown of any mining property void on the ground that it was issued in error or through improvidence or had been obtained by fraud. He has also special power given to him to "grant an order in the nature of mandamus," and generally is invested, so far as such matters are concerned, with all the powers of a territorial Judge. In the case at Bar, no application was made for a mandamus to compel the mining recorder or other proper officer to issue to the appellants the placer mining grants for which they had applied, nor is that officer made a party to this suit. The appellants come into Court simply as free miners who had staked out certain claims which were either within or without the boundaries of a certain hydraulic mining lease from the Crown, and for which placer mining claims they had not obtained any grant or licence. Their only excuse for bringing the defendants into Court at all was that the placer claims they had located were within, or claimed as being within, the boundaries of the defendants' lease which they desired to have cancelled.

If their claims were outside of this lease they could not possibly be entitled to any such declaration as that sought by them. As free

miners not having or claiming any grant or claim within the boundaries of lands included in a hydraulic mining lease they would not have a vestige of right to attack that lease or ask the Court to make any declaration concerning it.

On the other hand if they fell back on their alternative position and claimed that their placer locations were within the bounds of the defendants' prior lease and asked for a declaration from the Court to have it declared null and void, they surely were bound to allege and prove that they were entitled to some interest legal or equitable in the lands.

I agree substantially with the judgment of the Gold Commissioner, Mr. Senkler. I do not think that the mere fact of the appellants, as free miners. entering upon lands already leased by the Crown and professing to locate claims there gave them any right or interest in the lands, or any status to come into Court and ask for any declaration with respect to the validity of a prior lease from the Crown of those very lands.

To attain such a status mere staking is not sufficient. They must go further and obtain from the mining recorder their placer grants. If for any reasons he refuses to issue such grants then their remedy is by way of mandamus to compel him to do his duty. Until they have obtained such grants they are not in a position to attack the defendants' lease. They have neither title nor colour of title and have no interest legal or equitable in the lands, such as is necessary to enable them to maintain this action. If having obtained their grants they desire to have defendants' lease declared void it was open to them to take the necessary steps.

It was contended on the part of the respondents that to any such proceedings the Attorney-General should be made a party. But it is not necessary for us to determine this point in the view we take of this appeal and we do not therefore express any opinion upon it.

Mr. Peters raised the question as to the power of the Crown to grant hydraulic leases, under the fourth article of the regulations of 1898, until after the lands had been withdrawn from placer mining under the thirteenth article of the same regulations.

It does not appear to me that this article or section bears the construction he sought to have put upon it. The power of the minister to grant leases and the limits, conditions and terms under which he may grant them are defined and complete in the first three sections of the regulations. The thirteenth section has no reference to the granting of such leases and was never intended to create an antecedent condition to their being granted. It had reference to a different thing altogether, namely, the policy of proclaiming or setting apart a large area of country which would not be open to

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placer mining. Such proclaimed area might, as a matter of policy, be leased afterwards or not, as circumstances determined, or it might afterwards be thrown open to placer mining. But the proclamation withdrew it from placer mining in the meantime until it was determined whether hydraulic leases should be given or not.

However a lease granted either under the third or fourth section is not affected, in my opinion, by the fact that the lands leased had not been previously withdrawn from placer mining. Placer miners who had properly located claims before the lease are of course not affected by it.

But whether I am right or not in my construction of these regulations cannot affect the conclusion I have reached that the plaintiffs (appellants not having obtained their placer grants) have no status to enable them to attack an existing Crown lease.

The appeal should be dismissed with costs.

MILLS, J.

MILLS, J.—I have had the perusal of the judgment of my brother Davies in this case. In that judgment I entirely concur. As the law in the case is effectually settled by the decision of their Lordships of the Judicial Committee of the Privy Council in *Osborne* v. *Morgan* (1888), 13 A. C. 227, at pp. 239, I do not feel that I can usefully add anything.

Appeal dismissed with costs.

NOTE.—Though this case is from the Yukon Territory, and is decided on the system there in force of making actual grants from the Crown, yet it is and will be of much assistance regarding mining leases in this Province, and in general it confirms the decision of Needham, C.J., in *Canadian Company* v. *Grouse Creek Flume Co., Ltd.* (1867), 1 M. M. C. 3.

As to conflicting Yukon mining grants and mode of location thereof, see *St. Laurent* v. *Mercier, post*, p. 46, and *Victor* v. *Butler* (1901), 1 M. M. C. 438, 8 B. C. 100. And cf. *Fielding* v. *Mott* (1885), 18 Nov. Sc. 339; (1886) 14 S. C. R. 254.

As to renewal of grants and licences, and payment of royalty, see *The King* v. *Chappelle* (1902), 7 Ex. 414; (1902), 32 S. C. 587; (1904), A. C. 127.

As to gulch claims and amendment: see *Creese* v. *Fleischman* (1903), 34 S. C. 279.

Acts imposing forfeiture for non-compliance with terms of mining leases will be construed strictly against the Crown, and where there has been a substantial compliance forfeiture will be relieved against. *Attorney-General* v. *Waverley Gold Mining Company* (1902), 35 Nov. Sco. 192.

IN RE WATER CLAUSES CONSOLIDATION ACT—CENTRE STAR MINING CO., LTD., v. CITY OF ROSSLAND.

1903.
January 26.

FULL COURT.

Water Record—Grant of under Private Act—Paramount but not Exclusive Rights—Unused and Waste Water—Jurisdiction of Gold Commissioner under section 18 of the Water Clauses Consolidation Act.

Under section 11 of the Rossland Water and Light Company Incorporation Act, 1896, the rights of the City of Rossland, which purchased the water works system of the Company, to the waters of Stoney Creek, are paramount but not exclusive, and the Gold Commissioner has jurisdiction to adjudicate on an application under section 18 of the Water Clauses Consolidation Act for an interim record of the surplus water not used by the City.

Statement

APPEAL from the decision of HUNTER, C.J., on a petition by the Company by way of appeal from a decision of the Gold Commissioner at Rossland.

The petitioning company claimed that they were entitled, under the Water Clauses Consolidation Act, to an interim record of the surplus water of Stoney Creek which the City of Rossland did not need and with its existing plant could not use. On the application for the interim record, Mr. Kirkup, the Gold Commissioner, dismissed the application.

The petition by way of appeal was argued at Rossland before HUNTER, C.J. The facts appear fully in the judgments.

Argument.

Galt, for the petitioning Company.

Abbott, for the City of Rossland.

Judgment below, HUNTER, C.J.

HUNTER, C.J.:—These are petitions by way of appeal from the decisions of the Gold Commissioner at Rossland refusing the petitioners' applications under the Water Clauses Consolidation Act, 1897, for interim records of fifty inches of water for mining purposes on Stoney Creek above the elevation of 3,021 feet above the sea.

The Commissioner held that the city had the exclusive right to the waters of Stoney Creek, and therefore that he had no power to entertain the applications.

By chapter 61 of the Statutes of 1896, the Rossland Water and Light Company were incorporated for the purpose of supplying water, electric light and electric power to the then town of Rossland and the mines thereto adjacent, and were empowered by section 11

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for water works purposes, "to divert and appropriate so much of the waters of Stoney Creek, Little Stoney Creek and Little Sheep Creek as the Lieutenant-Governor in Council may deem necessary and proper, above the elevation of 3,021 feet above the sea," and by section 12, for electric purposes, to divert and appropriate so much of the waters of the said creeks as it should judge suitable and desirable, conditional on the approval of the Lieutenant-Governor in Council of the plans, etc., and on publication of notice of intention to apply for his authority, etc.

By indenture dated August 2nd, 1899, the company transferred its water works and appurtenances to the city and also gave the city an option on its electric light plant, but I need not say anything more as to this latter, as the case involves only the consideration of the rights of the city with regard to the waters of Stoney Creek.

By order-in-council dated September 25th, 1899, it was ordered "that the diversion and appropriation by the Rossland Water and Light Company or their assignees, of all the waters of Stoney Creek and Little Stoney Creek above the elevation set out in their Act of incorporation (59 Vict. cap. 61), for the purposes of the company, be and the same is hereby approved and confirmed pursuant to section 11 of the said Act."

Judgment below, HUNTER, C.J.

By chapter 32 of the statutes of 1900, the transfer to the city was confirmed and the city has since had whatever rights in the premises that were possessed by the company.

The question then for decision is, whether the city has the sole and exclusive right to the waters of Stoney Creek or whether its right is paramount but not exclusive, and in my opinion the latter view is correct.

To begin with, the incorporating Act is careful throughout to guard the interests of the Crown and the public by making the powers of the company subject to future legislation and existing rights, as by section 42, it is enacted "The powers and privileges conferred by this Act, and the provisions hereof, are hereby declared to be granted, subject to the rights of the Crown, and also subject to any future legislation regarding the subject-matter of this Act, or of the powers and provisions hereby conferred, which the Legislature may see fit to adopt; and this Act is passed on the express conditions that the Lieutenant-Governor in Council may from time to time impose and reserve to the Crown, in right of the Province, such rents, royalties, toll and charges in respect of the waters, or of the lands of the Crown (if any), rights and privileges, which shall be set out, appropriated, or enjoyed by the company, or are conferred by this Act, as by the Lieutenant-Governor in Council shall be deemed to be just and proper, etc." And by section 45 it is enacted "This

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Act shall not be deemed in any way to authorize any interference with or abrogation of the powers, rights, and privileges of any person or corporation heretofore granted or acquired."

In the next place the language of section 11 does not in terms confer the exclusive right to divert and appropriate the water, nor are there any other words to be found in it which would amount to a grant of the stream or water course in question. Even in the case of a deed from A. to B. the right given to divert and appropriate water without more, would not confer the exclusive right to divert and appropriate the water, but A. would have it in his power if he chose, to grant a similar right or licence to others, subject of course, to the right already given to B. The question as to whether a particular right of licence granted by a subject was or was not exclusive has arisen in numerous cases.

For instance, in *Duke of Sutherland* v. *Heathcote* (1891), 3 Ch. 504 at p. 517, on appeal (1902), 1 Ch. 475, Lindley, L.J., speaking of a reservation to get coal, says at page 485, "An exclusive right to all the profit of a particular kind can, no doubt, be granted; but such a right cannot be inferred from language which is not clear and explicit;" and again "*Lord Mountjoy's Case* has always been regarded as a leading authority for the proposition that a grant in fee of liberty to dig ore does not confer on the grantee an exclusive right to dig them, even if the grant is in terms without any interruption by the grantor."

Judgment below, HUNTER, C.J.

In *In re Haven Gold Mining Company* (1882), 20 Ch. D. 151 at p. 160, Jessel, M. R., speaking of a licence to sink shafts or tunnel for gold says, "It was not an exclusive licence, and therefore if this New Zealand savage was the owner of the property there was nothing to prevent his granting licences to other people, and, as I said before, there is no grant of the gold itself to Mr. Eicke."

In *Carr* v. *Benson* (1868), 3 Chy. App. 524, at p. 532, Wood, L.J., speaking of a power to dig fire clay, says, "The plaintiff's licence, it is conceded, is not an exclusive licence, and it has been held from the earliest period that a man taking a licence where he is under no obligation to work, cannot exclude his licensor from granting as many more of those licences as he thinks fit, provided always that they are not so granted as to defeat the known objects of the licencee in applying for his licence;" and again at p. 534, "the licence cannot be reasonably construed to operate as a grant to the plaintiff of as much of this particular mineral as he can possibly make use of in the course of his business. What the plaintiff could raise and get he was to have, but he could not bring trover against the lessor for removing the remainder."

In *Newby* v. *Harrison* (1861), 1 J. & H. 393 at p. 396, the same learned Judge speaking of a liberty to take ice from a canal says,

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"The first question that arises upon the plaintiff's leases is, whether there is an exclusive licence. It appears to me, that I cannot hold it to be an exclusive licence, because, if it were intended so to be, it would be framed with words of an exclusive character. That may I think, be assumed, unless I find something in the deed which compels me to come to a different conclusion. The distinction is well known between an ordinary licence and an exclusive licence, and in the latter you expect to find something of that nature expressed."

In *Ross* v. *Fox* (1867), 13 Gr. 683, Spragge, V.C., decided that a power to dig for mineral was not an exclusive right, and in support of his view, referred to the fact that there was no compulsion on the licencee to work the minerals, and it is needless to add that the city is under no compulsion to maintain any water works system at all, although by section 32 of the Act, if it does maintain it, it must supply applicants on certain conditions.

In *Sinnott* v. *Scoble* (1884), 11 S. C. R. 571, it was decided that a licence to cut timber was not exclusive, and that it did not give the licencee any property in the standing trees or interest in the land.

Judgment below, HUNTER, C.J.

And I apprehend that so far as concerns the determination of the question as to whether the particular right claimed is exclusive or not, or such as to amount to a grant of the thing itself, it makes no difference whether the right is of the nature of a licence, or privilege, or an easement, or a profit *a prendre*. In fact these cases proceed on the plain principle that an instrument giving a right to dig ore, cut timber or take ice, etc., as the case may be, means exactly what it says, *i.e.*, gives only a right and not the sole or exclusive right unless the context clearly shews otherwise.

These were cases as between subject and subject, so that *a fortiori* in a case of such a right conferred by the Crown or the legislature, it would require apt and explicit language to uphold its exclusive character.

Then again, even if there were no such saving clauses as section 42 in the Act, and there was any doubt as to the intention of the legislature, two rules of construction in relation to statutes would require me to hold that the city's right is not exclusive; the first being that the Act should be construed in favour of the right of the Crown through the Gold Commissioner to dispose of the unused water, and the second, that enunciated by Strong, C.J., in the *St. Hyacinthe Case* (1895), 25 S. C. R. at pp. 173 and 174, which I have already quoted in *Calder* v. *The Law Society* (1902), 9 B. C. at p. 58.

For these reasons I am of the opinion that the city's right to take the water from Stoney Creek is paramount but not exclusive, and

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that the Gold Commissioner's ruling was wrong, and therefore that the applications must be referred back to him for further consideration.

The petitioners will have their costs of the appeals.

Appeal.

The city appealed to the Full Court and the appeal was argued at Victoria on the 22nd of January, 1903, before WALKEM, DRAKE, IRVING and MARTIN, JJ.

Argument

Duff, K.C., for appellant: The Water Clauses Consolidation Act has no application to the water already dealt with by the special Act passed in 1896. The company applied for an interim record under section 18 of the general Act, but section 18 cannot apply to rights such as have been granted the City of Rossland; this water is not subject to be taken under the general Act, therefore the term "unrecorded water" cannot sensibly be applied to it and the definition in the interpretation clause does not apply. Section 18 refers only to unused recorded water; if not, the application for an interim record would have been made under section 10. A grant of water under a private Act is not dealt with by the statute as a "record." A subsequent general statute does not interfere with a special statute: see *Garnett* v. *Bradley* (1878), 3 App. Cas. 944; *Barker* v. *Edger* (1898), A. C. 748, and *Seward* v. *Vera Cruz* (1884), 10 App. Cas. 59; *Tracey* v. *Pretty & Sons* (1901), 1 K. B. 444 at p. 470, and Maxwell on Statutes, 3rd Ed., 242-3. A clear indication that the rights under the special Act were intended to be in any way derogated does not clearly appear.

Galt, for respondent, referred to Blackstone's Commentaries, p. 18, shewing that there is no such thing as a proprietary interest in water itself, but only a usufructuary interest. Section 42 of the special Act shews that the legislature in 1896 had in view the intention of passing a general Act dealing with water and which was passed the next year. Section 4 of the general Act vests unrecorded water in the Crown, and section 2 says "unrecorded water" shall include water not used for a beneficial purpose.

All we want is the water not being used. The key-note of the Water Clauses Consolidation Act is equitable distribution and greatest beneficial use of all available water supply: see sections 7, 13, 18, 28, 144 and 146. It is against the policy of the Act to allow parties to say "we own the water, but we need not use it and may waste it if we please." Section 44 (*a*) clearly recognizes the right of an applicant to obtain an interim record where, as in this case, a municipality holds a prior record, but is not using all the water.

Duff, replied.

Cur. adv. vult.

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WALKEM, J.

Judgment.

WALKEM, J.—I agree with the judgment appealed from, and am of the opinion that the appeal should be dismissed with costs.

In coming to this conclusion, I wish it to be understood that I only intend to hold with the learned Chief Justice that Mr. Kirkup had jurisdiction to deal with the matters brought before him.

DRAKE, J.

DRAKE, J.—The Rossland Water and Light Company was incorporated in 1896 on a private Act, and in the preamble the objects stated are to supply the Town of Rossland with water, and the power to be taken from Stoney Creek, Little Stoney Creek, and Sheep Creek. By section 11, the company were authorized to enter upon Crown lands and to divert and appropriate so much of the waters of Stoney Creek and the other creeks mentioned, as the Lieutenant-Governor in Council may deem necessary and proper above the elevation of 3,021 feet. The Governor in Council on the 25th day of September, 1899, gave the company all the water in Stoney Creek and Little Stoney Creek above the altitude indicated. In 1897 the Water Clauses Act was passed. The preamble of that Act is to confirm to the Crown all unreserved and unappropriated water, and water power. Unrecorded water in this Act means water which for the time being is not held and used in accordance with the record under any public or private Act, and includes all water for the time being unappropriated or unoccupied or not used for a beneficial purpose.

The above-named company are not using the whole of the water granted to them by the order in council. The order in council is a record. Mr. Duff contended that as the general Act which was passed subsequent to the special, and which did not in terms mention the special Act, could not be held as interfering with the grant of all the waters in these creeks, and cited *Garnett* v. *Bradley* (1878), 3 App. Cas. 944, at p. 950; *Barker* v. *Edger* (1898), A. C. 748 at p. 754 and *Seward* v. *Vera Cruz* (1884), 10 App. Cas. 59. These cases are distinguishable from the present case inasmuch as the Act under review does not in words affect past legislation.

The definition* of unrecorded water includes water granted under any public or private Act, unappropriated or unoccupied or not used for a beneficial purpose, and therefore includes the water granted to the Rossland Water Company running to waste. The incorporating Act is also by section 42 made subject to any further legisla-

* "Unrecorded water" shall mean all water which for the time being is not held under and used in accordance with a record under this Act, or under the Acts repealed hereby, or under special grant by public or private Act, and shall include all water for the time being unappropriated or unoccupied, or not used for a beneficial purpose.

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tion regarding the subject matter of the Act, or of the powers or provisions thereby conferred.

The learned Chief Justice discussed the various authorities which refer to the question whether the grant is an exclusive one or not. The law thus referred to shews clearly that a licence from the Crown is not an exclusive right unless the language used is clear and definite. If the Water Company were using all the water granted to them there would be nothing left on which a further grant could operate; but all that the applicants ask for is liberty to use the unappropriated water, and this, as it does not affect the corporation user, can in my opinion be given; and such being the case I think the appeal should be dismissed with costs, and the judgment of the Chief Justice confirmed.

IRVING, J.

IRVING, J.—The application for an interim record is resisted on the principle that a later general law does not abrogate an earlier special one.

The principle is limited to those cases in which the later Act does not in itself or its history shew that the Legislature, at the time of the passing of the later Act, had its attention turned to the earlier special Act.

At p. 250 *et seq.*, in Maxwell on Statutes, 1896, Ed., a number of instances are cited.

If the general Act deals specifically with the special Act, the principle of course would not be applicable. The same result occurs if it is plain either by anticipatory words inserted in the special Act, or by the history and language of the general Act; or where both these grounds for the non-application of the principle exist.

If we turn to the private Acts passed in the same session in which the Water Privileges Act of 1892 was passed, we will find several private water Acts in which language similar to that used in section 42 of the Rossland Electric Light Company Act, occurs. Again, in 1893, 1895 and 1896, the same language is inserted. In short, in all Acts, with one or two exceptions, passed in 1892, and afterwards, until the Water Clauses Consolidation Act, 1897, was passed, we find the same anticipatory words, which occur in section 42 of the Rossland Electric Light Company Act.

Then in 1897 came the Water Clauses Consolidation Act with its preamble, its far-reaching definition of "unrecorded" water, and its fourth section.* I am of opinion that the Rossland Water and

* "4. The right to the use of the unrecorded water at any time in any river, lake, or stream, is hereby declared to be vested in the Crown in the right of the Province, and, save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appro-

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MARTIN, J.

Light Company is within the sweep of the Water Clauses Consolidation Act, and that the appeal should be dismissed.

MARTIN, J.—The right of the city under its record to the water not at present being "used for a beneficial purpose" is not lost, but only dormant, and can be revived if the necessity arise for the use of the water now going to waste.

Appeal dismissed with costs.

NOTE.—For other cases under this Act: see *War Eagle Consol. Ming. Co.* v. *Brit. Col. Southern Ry. Co.* (1901), 1 M. M. C. 422, 465; *Centre Star Ming. Co.* v. *Brit. Col. Southern Ry. Co.*, *Ib.* 421, 460; *Ross* v. *Thompson*, *post*, p. 79; *In re Water Clauses Consol. Act and Rossland Power Co. Ltd.* *post*, p. 135. And cf. also *Byron N. White Co.* v. *Sandon Water Works Co.*, *post*, p. 240; *Brown* v. *Spruce Creek Power Co., Ltd.*, *post*, p. 254.

Riparian rights are thus restricted by the 5th section of this Act:

"5. No right to the permanent diversion or to the exclusive use of the water in any river, lake, or stream shall be acquired by any riparian owner, or by any other person, by length of use or otherwise than as the same may be acquired or conferred under the provisions of this Act, or of some existing or future Act."

A railway company, the owner of a tenement adjoining a natural stream has no right to divert water to a place outside the tenement, and there consume it for purposes unconnected with the tenement: *McCartney* v. *Londonderry & Lough Swilly Ry. Co.* (1904), A. C. 301.

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priate any water from any river, water-course, lake, or stream, excepting under the provisions of this Act, or of some other Act already or hereafter to be passed, or except in the exercise of the general right of all persons to use water for domestic and stock supply from any river, lake, or stream vested in the Crown, and to which there is access by a public road or reserve."

NOBLE FIVE CONSOL. MINING AND MILLING CO., LTD., ET AL., v. LAST CHANCE MINING CO., LTD.

1903. February 6.

FULL COURT.

(9 B. C. 514.)

Practice—Trial of Action Respecting Extra-lateral Rights—Postponement of Trial—Peremptory Order—Mineral Act, 1891, sec. 31—Appeal, Notice of—Extension of Time—Jurisdiction.

In an action between the owners of adjoining mineral claims respecting extra-lateral rights, the parties claiming such rights will not be forced on to trial without being given a fair opportunity of doing such development work as may be necessary to determine the position of the apex of the vein in question. A peremptory order for trial should not be made.

Quaere.—Should the Full Court question its own decision in *Sung* v. *Lung* (1901), 8 B. C. 423, holding that it had no jurisdiction to extend the time for bringing an appeal?

APPEAL from an order of DRAKE, J.

Statement.

The plaintiffs were the owners of the World's Fair mineral claim in Kootenay District, and brought an action claiming damages and an injunction against the defendants, who they alleged were running a tunnel from an adjoining claim on to their (the plaintiffs') claim. The defendants in their statement of defence pleaded that they owned the Last Chance and Blue Jay claims, which were located under the provisions of the Mineral Act, 1891, and so were entitled to extralateral rights, and that the apex of the vein on which the said work in the World's Fair mineral claim was done is found upon the surfaces of the Last Chance and Blue Jay claims, and that in its course downwards departs from the perpendicular and extends into the World's Fair claim.

The trial was fixed for the July, 1902, sittings in Victoria, but the Full Court (on an appeal from the order of WALKEM, J., who refused defendants' application for an adjournment) granted a postponement until the October sittings, with liberty to defendants to apply before said sittings for a further postponement on producing proof to the satisfaction of the Court or a Judge that a postponement was necessary, and that they had complied with the terms of the order, the term of which material to be stated here being that work on their claims be prosecuted with due diligence by the defendants for the purpose of supporting their claim to extralateral rights as alleged in the pleadings. In October, on the defendants' application, the trial was further adjourned until the December, 1902, sittings. In November, the defendants applied for a further

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adjournment and shewed by affidavit that they had commenced the work ordered by the Full Court as soon as it could conveniently be commenced and had prosecuted it with diligence until stopped by snow; that it would not be possible to do any more of the work before the 1st of June, 1903, and in some places before about August, 1903, and that the work still necessary to be done to establish definitely the continuity of the vein from the apex would take three or four months or more. For the plaintiffs it was contended that defendants were then mining in their ground and taking ore therefrom.

On the 20th of November, an order was made by DRAKE, J., as follows:

"It is ordered that the trial of this action be and the same is hereby postponed until the session of the Court to be held at the City of Victoria, in the month of July, 1903, peremptory;

"And it is further ordered, that the defendants do pay to the plaintiffs such damages as they shall suffer by reason of the delay caused by the postponement of the trial hereby ordered;

"And it is further ordered that the costs of this application be costs to the plaintiffs in any event of the cause."

Appeal.

This order was not settled until the 1st of December, 1902. On 24th November, defendants served a notice of appeal against so much of the order as ordered the date set for the trial to be peremptory, the grounds of appeal being, that the learned Judge should not have imposed the term complained of and that the term complained of is contrary to the direction contained in the Full Court order, dated the 30th day of June, 1902.

On the 1st of December, defendants served an additional notice of appeal against so much of the said order as ordered that they should pay to the plaintiffs such damages as the plaintiffs might suffer by reason of the postponement, the grounds of appeal being the same as in the former notice.

The appeal came on for argument on the 5th of February, 1903, before HUNTER, C.J., IRVING and MARTIN, JJ.

Argument.

Bodwell, K.C., for appellants.

Luxton, for respondents, took the preliminary objection that the second notice of appeal was out of time as the time begins to run from the time of the pronouncement of the order.

Bodwell.—If it is held that the notice was given late I ask for leave to extend the time.

[MARTIN, J., referred to *Sung* v. *Lung* (1901), 8 B. C. 423, and said the Court had already held it had no jurisdiction to extend the time.]

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HUNTER, C.J.

I would like to argue the point as it seems to me the Court has the power to extend the time; the matter may still be reconsidered.

[HUNTER, C.J.—Where the Court is the Court of ultimate appeal it can set aside a former decision, as we are not bound to perpetuate error; there are numerous examples of it in the Privy Council, in the Appeal Courts and in the Supreme Court of the United States.]

The argument on that part of the appeal of which notice had been given in time was then proceeded with, the Chief Justice announcing that if it became necessary to consider the other part of the appeal the Full Bench would be summoned to consider whether or not the Court had power to extend the time.

Bodwell.—The peremptory clause should not have been put in the order; it will be impossible for us to go to trial in July, and we should have an opportunity to apply for an adjournment again in July.

Luxton.—The Judge's discretion should not be interfered with: see r. 356. They are not entitled to the extralateral rights claimed—if a vertical plane extended were drawn through the easterly end lines of the Blue Jay extended, the workings in the World's Fair would be beyond.

[HUNTER, C.J.—There is an appropriate way of getting that decided.]

I can mention it here to shew that the appellants wish to delay us.

Cur. adv. vult.

6th February, 1903.

Judgment.

HUNTER, C.J.—It is not necessary to consider the second branch of the appeal, because the defendants are entitled to the postponement and it should not have been made peremptory, because the peremptory postponement till July was useless to the defendants. By the time of the October sittings the defendants will probably have had ample time to ascertain the necessary facts and a strong case will have to be shewn by them in order to get a further postponement. The whole order falls. The appeal should be allowed with costs.

IRVING, J.

IRVING, J.—The appeal should be allowed in terms of the first notice.

MARTIN, J.

MARTIN, J.—I agree. Rule 683 renders it unnecessary for us to consider the second notice at all, and in any event the whole order stands or falls together, nor can there be any separation of its terms. In any event a direction for payment of damages is now inconsistent

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with the order we are making on this appeal; if defendants are entitled to an adjournment till October without paying damages it would be absurd to say that they should pay damages for an adjournment till July, which is worse than useless.

Ordered that so much of the order as ordered that the date set for the trial of the action be peremptory be set aside and that the respondents pay to the appellants the costs of the appeal.

NOTE.—As to the Full Court overruling its own decision in *Sung* v. *Lung*: see *Jordan* v. *McMillan* (1901), 8 B. C. 28, wherein the Full Court (McCOLL, DRAKE, IRVING and MARTIN, JJ.), decided that "the only point having been decided by a majority of this Court, we are bound by its decision. It would not be so if some enactment had not been brought to the attention of the Court, and there may be other cases, but as this Court is constituted it would introduce the wildest uncertainty in the administration of justice if we were to hold that a former decision is not binding merely because due consideration may not have been given to a question of this kind.

Since this question of the extension of time is an important one, particularly in mining litigation, it is desirable to give for the first time a report of the case of *Clabon* v. *Lawry*, which *Sung* v. *Lung* follows.

CLABON V. LAWRY,

FULL COURT.] [JANUARY 20TH, 1898.

Held:—The Court has no jurisdiction to extend the time for giving notice of appeal under secs. 7, 8 and 12 of the Supreme Court Act Amendment Act, 1897.

Carroll v. *Can. Pac. Railway Co.*, followed.

Judgment was given in favour of the plaintiff by His Honour Judge Spinks in the County Court of Kootenay, at Rossland, on the 22nd day of May, 1896. On the 1st day of October next thereafter, the defendant served a notice of motion for leave to enter and set down a notice of motion to appeal from the said judgment "notwithstanding there has already been a sittings of the Full Court since the trial of the action."

In support of the application the defendant's solicitor filed an affidavit swearing to merits and setting forth that the reason why the appeal had not been set down for the intervening sittings in July was because he had been unable to obtain the Judge's notes of evidence which it was necessary for him to have in order to proceed with the appeal, though he had made several verbal applications to the Judge therefor, and also three subsequent written applications.

In the meantime, and on the 21st of November, the plaintiff gave notice of appeal and on the 27th of November set it down for hearing.

The motion came on for argument on the 9th of December, 1896, before McCREIGHT, WALKEM and McCOLL, JJ.

Archer Martin for the motion.

Jay, contra.—A preliminary objection is that the appeal is out of time for notice has admittedly not been given for the prior sittings of the Court in July, as required by sec. 18 of the Supreme Court Amendment Act, 1896, which directs that "Notice of appeal to the Full Court from any final judgment or order or decree shall not be less than a fourteen-day notice, and, if the judgment, order, or decree is made more than fourteen days before the sittings of the Full Court, shall be for the then next sittings of the Full Court, etc., etc."

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Martin, in reply:—By virtue of Rule 684 the time of one year there given within which to appeal from a final judgment had not expired, and sec. 16 has not the effect of shortening it. But if it has, then the error here has arisen from a general misapprehension of this new and ambiguous statute relating to procedure, and the time for appeal should in this special case and unusual circumstances, where the solicitor has done everything possible to perfect his appeal, be enlarged under Rule 743, thus following the practice laid down in similar circumstances by the Court of Appeal in Ontario, in *Graham* v. *Temperance and General Life Assce. Co.* (1896), 17 Prac. 271; and I rely also on *McFeeters* v. *Dixon* (1870), 3 Ch. Ch. 84, 88; *In re Good Friday, etc., Mineral Claim* (1896), 4 B. C. 496; *In re Manchester Economic Bldg. Soc.* (1883), 24 C. D. 488; *Collins* v. *Vestry of Paddington* (1880), 5 Q. B. D. 368; *Cusack* v. *Lond. & N. W. Ry. Co.* (1891), 1 Q. B. 347; *Esdaile* v. *Payne* (1889), 40 C. D. 520; *In re Watson* (1887), 19 Q. B. D. 234; *Re Arbenz* (1887), 35 C. D. 248.

The Court reserved judgment on the preliminary objection, and the appeal was proceeded with on the merits subject to such objection, and after considerable argument by both counsel further hearing was adjourned pending a reference back to the trial Judge for an explanation of the presence among the papers of two certain documents which were not identified as having been produced at the trial, and also for his reasons for judgment.

On the 30th of December, 1897, the learned trial Judge gave his reasons for judgment in writing, and the matter finally came on for further argument on the 18th of January, 1898, before WALKEM, DRAKE, and IRVING, JJ.

Jay, for plaintiff, renewed his former objection and relied additionally on secs. 7 (5), 9, and 12 (1) of the "Supreme Court Amendment Act, 1897," and the recent decision of the Full Court (MCCREIGHT, WALKEM, and DRAKE, JJ.), thereon in *Carroll* v. *Can. Pac. Ry.*, unreported, November 5th, 1897, that unless notice of appeal was given within the time specified by the Act the Court had no jurisdiction to extend it.

Martin, in reply, relied on secs. 11 and 12* of the said Act of 1897, and on the authorities already cited, and further submitted that it would be a great hardship to give effect at this late stage to an intervening decision, seeing that the appeal had already been largely argued on the merits long before the decision in *Carroll* v. *Can. Pac. Ry.*, and the reasons of the trial Judge sent for by this Court were at last forthcoming and the matter could now be disposed of after such long delay.

Cur. adv. vult.

January 20th, 1898.

Per CURIAM:—The giving of due notice of appeal is a pre-requisite to the right of appeal, and because of the failure in this case to give that notice the Court has no jurisdiction to entertain the appeal.

Appeal dismissed with costs.

For other cases on postponement of trial see *Hanna* v. *Morgan*, *post*, p. 142, and *Tanghe* v. *Morgan*, *post*, p. 178.

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*Secs. 11 and 12 are the same as secs. 98 and 94 of the present Sup. Court Act, 1903-4.

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FULL COURT.

STAR MINING AND MILLING CO., LTD. LBY., v. BYRON N. WHITE CO.

(9 B. C. 422.)

Practice—Inspection—Underground Workings — Extralateral Rights—Plans, Right to Inspect and Copy—Enforcing Order—Discovery—Privilege—Rule 514.

The right to inspect underground workings in a mine carries with it the right to inspect and make copies of the plans of such workings.

Per MARTIN, J.: (1) The practice respecting inspection under r. 514 is distinct from the practice in obtaining discovery and a claim of privilege set up in an affidavit in answer to a motion to compel inspection is not conclusive.

(2) It is a proper and convenient practice to apply to the Court to enforce an order for inspection.

Statement.

MOTION to compel defendant company to produce for inspection certain working plans and drawings which it was alleged the plaintiff company was entitled to inspect and make copies of under an order of Court dated the 11th of December, 1901, and affirmed (save in one particular not material to this report) by the Full Court on the 10th of January, 1902. See vol. i., p. 468.

On the return of the motion, the defendant company set up a claim of privilege. The facts appear in the following judgment of

31st May, 1902.

Judgment at trial, MARTIN, J.

MARTIN, J.—By an order of this Court made on the 11th day of December, 1901, the plaintiff company was, *inter alia*, given leave to "inspect and make copies of the working or mining plans, drawings, charts, or surveys of the defendants at any time made or used and any number connected with any and all of their said workings and mining operations in or upon" certain specified mineral claims owned and worked by the defendants "so far as may be necessary to ascertain whether the defendants have worked or are working into and under the surface of the plaintiffs' claims and the nature and extent thereof and the quantity of mineral or ore (if any) removed therefrom, and also so far as may be necessary to ascertain the apex and location or position thereof as to the lodes or veins or ore deposits which may have been or are being operated or mined by the defendants under the surface of the plaintiffs' claim."

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This order was affirmed, save in one particular not at present material, by the Full Court on the 10th of January, 1902—9 B. C. 9; 1 M. M. C. 468.

The present is a motion to compel the defendant company to produce for inspection certain working plans and drawings which it is alleged the plaintiff is entitled to inspect and make copies of under the said order of the 11th of December, 1901, and in support of the application are filed affidavits of two surveyors and of the manager of the plaintiff's mines. The result of my consideration of facts set out in these affidavits, and of the accompanying plans and of the affidavit of Oscar V. White, filed in reply, is that for the purposes of effectuating the true intent of the said order the plaintiff is entitled to the production and inspection asked for unless the defendant's contention in regard to the construction to be placed upon r. 514, by virtue of which the order was made, is correct.

That contention is founded on the affidavit of the said White, the defendant's mine superintendent, which sets up a claim of privilege and objects to the production of any plan (other than one tracing which is of practically no assistance) because as White deposes, the defendants "have been advised by their solicitor, and I verily believe that the said maps or plans are not documents material to this action, that they do not contain any information which the plaintiffs are entitled to obtain for the purpose of their suit, and do not disclose any fact or circumstance which is detrimental to the defendants' case or which would in any manner support the plaintiffs' claim in this action."

Judgment at trial, MARTIN, J.

It is argued that a claim of privilege can be so set up under r. 514 in the same manner as in proceedings for discovery, and that the affidavit is conclusive unless it comes within one of the excepted cases which are conveniently set out in the Yearly Practice, 1902, pp. 319-20. I find myself unable to take this view of r. 514, and have come to the conclusion that said rule authorizes a procedure distinct from discovery in the general acceptance of that term. If this be not so, then the defendant would have been able to prevent the surveyors from making surveys and plans of the mine, as authorized by said order, and would have justified its action by simply filing an affidavit in terms almost precisely similar to that here relied upon. But it must, I think, be apparent that such an affidavit would under such circumstances be no answer to an application to compel the defendant to allow surveyors to enter its mine for said purpose; hence it follows that r. 514 does differ from the rules relating to discovery in this essential particular, and if the principle relied on does not apply to a survey it cannot apply to an inspection directed by the same rule. The cases of *E. & N. Ry. Co.* v. *New Vancouver Coal Co.* (1898) 1 M. M. C. 223; 6 B. C. 194; *Centre Star* v. *Iron*

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Mask (1898), 1 M. M. C. 267; 6 B. C. 355, and *Iron Mask* v. *Centre Star* (1899), 1 M. M. C. 362; 7 B. C. 66, sustain this view.

Rule 514 provides a most useful and beneficial procedure, particularly in mining cases, but if the contention of the defendants' counsel is correct it is liable to be defeated by the simple statement of the mere belief of the immateriality of documents. I am of the opinion that such is not the practice, and that the application should be resisted by submitting such facts as will enable the Court to decide the question as one of fact in each particular case.

Though I have dealt with the matter as one of substance as regards all the plans, yet I point out that technically the plaintiff would in one respect be entitled to succeed in any event because the original of one admittedly relevant plan has, by an oversight as explained, not been produced, but merely a copy.

I might add that as a matter of practice the course that has been adopted of moving in the present way seems a proper and convenient manner of enforcing the order, there being no question of contumacious resistance on the part of the defendant company.

The application is granted; costs to the plaintiff in any event.

Appeal to FULL COURT.

The defendant company appealed and the appeal was argued at Victoria on the 9th and 10th of January, 1903, before HUNTER, C.J., DRAKE and IRVING, JJ.

The ground on which counsel for appellant based his argument was not taken in the Court below.

Argument.

Bodwell, K.C., for appellant. Rule 514 does not give the Court power to direct the production of plans, and the order of MCCOLL, C.J., and the judgment of the Full Court on appeal were given in error; although not able now to rescind its former order, the Court will refuse to carry out a wrong order. Rule 514 applies to property and not to title deeds; if a piece of property is the subject of an action it may be detained, or inspected, a mine may be entered and a plan must be produced, but these things are done under the ordinary rules of discovery. It will be argued that we cannot take this ground now, but the Court should not enforce an order known to be wrong—it will not perpetuate error. He cited *O'Connell* v. *McNamara* (1843), 3 Dr. & War. 411; *Hamilton* v. *Houghton* (1820), 2 Bligh. 169, at p. 193; and 4 Eng. Rep. 290, at p. 299; *Commercial Bank* v. *Graham* (1850), 4 Gr. 419 at p. 424; Mitford's Chancery Pleas, 116; *Morgan* v. ——— (1737), 1 Atk. 408; *White* v. *Parnther* (1829), 1 Kn. 179 at p. 221; *Lawrence Manufacturing Co.* v. *Janesville Mills* (1891), 138 U. S. 552 at p. 561, and *Reg.* v. *Victoria Lumber Co.* (1897), 5 B. C. 288.

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HUNTER, C.J.

[HUNTER, C.J.—But there the causes of action were different although identical, but here the orders are in the same suit.]

In some of the cases cited there had been no appeal from the decrees, but the Court held it was not bound to enforce a wrong decree.

Davis, K.C. (*S. S. Taylor*, K.C., with him), for respondent: Inspection alone is not sufficient for us as we allege some old workings have been closed up so it is necessary for us to see the plans. Liberty to see the plans of the workings is a necessary part of an order for inspection and leave to make copies of plans is ancillary to inspection: inspection includes taking extracts: *Boord* v. *African Consolidated Land and Trading Co.* (1898), 1 Ch. 596. He cited Daniell's Chy. Forms, 5th Ed., 950-1; Seton on Decrees, 6th Ed., 574; *Bevan* v. *Webb* (1901), 2 Ch. 59; *Lewis* v. *Earl of Londesborough* (1893), 2 Q. B. 191, where bills of exchange were photographed under Order 50, r. 3, which is the same as r. 514.

He was stopped.

Bodwell, in reply: The form in Seton is only the form of an order after judgment in an action for trespass to underground workings; the form in Daniell is only the form of a notice of motion. In the cases cited there was a clear right to see a book and the notes and so there was a right to make a copy and take photographs, but here there is no right to see the plans.

Cur. adv. vult.

6th February, 1903.

Judgment.

HUNTER, C.J.—In my opinion we cannot accede to Mr. Bodwell's contention that we should not enforce the former order of this Court on the ground that it is erroneous, as I think it was quite within the jurisdiction and discretion of the Court to make it. With regard to the power to order inspection, Order L., r. 3, is practically only declaratory of the jurisdiction which has long been well settled in the case of mines, machines, etc. (see *Earl of Lonsdale* v. *Curwen* (1799), 3 Bligh, 168, at p. 171), and which was gradually developed in the case of property generally (see Bray on Discovery, p. 577, *et seq.*, and cases cited), and is in fact little more than the application to the matters of practice dealt with therein of the doctrine that equity expands to meet the justice of new-arising cases.

In the case of underground workings it is a common practice for the order to allow access to the plans, for the simple reason that without such assistance the inspection would often be futile by reason of the concealment, obliteration, or inaccessibility of some of the workings. This being so, it follows that it would be unreasonable

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to expect those who make the inspection to carry the plans in their heads, and to say that they should not have a copy to assist them both in making the inspection, and to prepare their case with the aid of the results of the inspection. The forms given in the standard works sustain Mr. Davis' contention that the inspecting party may be allowed access to the plans and to take copies: see Daniell's Chy. Forms, 4th Ed., p. 786; 5th Ed., pp. 950, 951; Seton on Decrees, 6th Ed., p. 574; and in Chitty's K.B. Forms, 13th Ed., at pp. 226, 227, I find a form of application "to enter and inspect the (defendant's) mine and mining operations at . . . and to inspect the working plans relating thereto, and to make measurements and drawings of the said mine and mining operations, and copies of the said plans, so far as may be necessary or proper in order to ascertain whether," etc. . . . .

I am quite free to admit that the order appears to have gone further than was necessary, and that it might have contained an undertaking by counsel not to use the information gained by the inspection, or the copies, for any other purpose than that of the litigation, but these were matters which should have been brought to the attention of the Court when the order was being settled.

The present appeal is virtually an attempt to have the order reheard, which, in the case of a perfected interlocutory order is seldom if ever allowed, even when made on the heels of the decision: see *Birmingham and District Land Company* v. *London and North Western Railway Co.* (1886), 34 Ch. D. 261 at pp. 277 and 278. The appeal should be dismissed with costs.

DRAKE, J.

DRAKE, J.:—In this case the plaintiffs obtained an order to ascertain by inspection whether or not the defendants had worked or were working into and under the surface of the Heber Fraction and Rabbit Paw mineral claims, and the amount of mineral if any removed therefrom. There is no dispute as to the validity of this portion of the order, but what the defendants object to is the further part of the order that allows them for any or all of the said purposes to inspect and make copies of the working or mining plans, drawings, charts or surveys of the defendants at any time made or used in any manner connected with any and all of their said workings and mining operations in or upon any or all of the said above mentioned mineral claims.

Mr. Bodwell contended that r. 514 did not sanction this latter part of the order, that it was a new procedure not contemplated thereby. The Court of Equity has frequently made orders for inspection, and making plans of the workings of mines, and for the removal of obstructions to enable the inspection to be effective, but

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he contends that the use of the defendants' plans is something novel, and infringes the right, which every litigant has, not to produce his muniments of title, and plans come within that category. The production of working drawings is apparently contemplated by the forms given in Daniell and Seton on Decrees, and it is undoubtedly an advantage to both parties. The form of order given in *Earl of Lonsdale* v. *Curwen* (1799), 3 Bligh 168, at p. 171, and in *Walker* v. *Fletcher* (1804), in the same volume, 178, compel the defendants to remove all obstructions which would interfere with an inspection of closed up ways and workings, the cost of which might be very serious. The production of working plans would obviate this necessity. In my opinion the order as regards the production of the working plans limited to the ground under the surface of the Heber and the Rabbit Paw mineral claims is correct. It is I think clear that this was all that the original order intended to give. Perhaps the language used might be construed as giving the right to see the plans of the mines, but that is not the intention, and the defendants are right in restricting the plans to those under the land in dispute. If the working plans cover more ground than the disputed claims, the other portions can be sealed up. I also consider that the persons making copies of the plans should make a declaration not to disclose any evidence that might come to their knowledge from the inspection, except for the sole purpose of the action; and I am further of the opinion that every order made under this r. 514 should depend on the facts shewn to the Court, and that this judgment is not to be considered as laying down any general principle that plans should in all cases be produced.

I think that the costs of this appeal should be costs in the cause.

IRVING, J., concurred with HUNTER, C.J.

IRVING, J.

Appeal dismissed with costs.

NOTE.—In addition to the cases cited by MARTIN, J., on discovery, see also, on the point of compelling mine managers to answer questions on examination for discovery, the same case, *post*, p. 96.

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SUPREME COURT OF CANADA.*

ST. LAURENT v. MERCIER.

(33 S. C. 314.)

Yukon—Placer Mining Regulations of 1898 and 1901—Grant and Licence—Conflicting Locations—Renewal Grant—Unoccupied Crown Lands.

Where in the Yukon a renewal grant is obtained from the Crown of a location which includes an area which was not properly within the original grant because it formed part of an existing valid location, but which had lapsed before application for renewal, the title to such renewal grant cannot be questioned by subsequent over-locators on the re-granted area, but only by the Crown.

Seeing that the applicant for the renewal grant had been in continuous occupation of the whole ground as originally staked by him, including the lapsed portion, it was not necessary for him to have gone through the form of re-staking the identical ground and then making application *de novo* for a new grant; he was justified in the circumstances in adopting his original staking and making application for a renewal grant which was valid for the whole area embraced thereby.

Judgment of the Territorial Court of the Yukon affirmed, DAVIES, and ARMOUR, JJ., dissenting.

Statement.

APPEAL from the judgment of the Territorial Court of the Yukon Territory, sitting as a Court of Appeal constituted by the Ordinance of the 18th of March, 1901, respecting the hearing and decision of disputes in relation to the mining lands in the Yukon Territory, which affirmed the decision of the Gold Commissioner maintaining the plaintiff's action with costs.

The principal facts of this case are shortly as follows:—Creek claim No. 245, below Lower Discovery, on Dominion Creek, in the Yukon Territory, was recorded by one Waite, on the 29th January, 1898, renewed by him in January, 1899, but reverted to the Crown in January, 1900. The plaintiff recorded a hill-side claim opposite the upper half limit of No. 245, below Lower Discovery, on August 15th, 1899, and applied for and obtained a renewal grant of the same in August, 1900. The defendant, Trinque, staked bench-claim, No. 245, on the first tier, on the 7th March, 1901, and recorded on the 18th March, and the defendant St. Laurent staked bench claim No. 245, on the second tier, on the 10th March, 1901, and obtained a grant for the same on the 19th March, 1901. The other circumstances material to the issues are set out in the judgments now reported.

All these claims were subject to the regulations, by order in council, governing placer mining of the 18th of January, 1898,† and sections 13 and 14 of the regulations of the 13th of March, 1901.

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* *Present*:—Sir Elzear TASCHEREAU, C.J., and SEDGEWICK, DAVIES, MILLS, and ARMOUR, JJ.

† See *Victor* v. *Butler* (1901), 1 M. M. C. 438.

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Argument.

J. Lorne McDougall for the appellants. Under all the regulations staking and location constitute the root of title: See 1894-1899 Regulations, section 4; 18th January, 1898, Regulations, section 15; 13th March, 1901, Regulations, section 14; *Atkins* v. *Coy* (1896), 1 M. M. C. 88; 5 B. C. 6. A *sine qua non* of valid location, staking or grant, under all the regulations, is that the ground staked should be vacant unrecorded Dominion lands at the time of staking. 1894-1899 Regulations. See Form H., 18th January, 1898, Regulations, sec. 8 and Form H., 13th March, 1901, Regulations, sec. 8; *Belk* v. *Meagher* (1881), 1 Morr. M. R. 510, 522; *Cranston et al.* v. *English Canadian Co.* (1900), 1 M. M. C. 394; 7 B. C. 266; *Victor* v. *Butler* (1901), 1 M. M. C. 438; 8 B. C. 100; Lindley on Mines, p. 363; Barringer & Adams on Mines, p. 306; *Coplen* v. *Callahan* (1899-1900), 1 M. M. C. 348; 7 B. C. 422; 30 S. C. 555.

If by reason of a prior valid location the staking is ineffectual as to the whole or a part of the ground staked, the subsequent abandonment or forfeiture of the proper location cannot inure to the benefit of the person claiming under the ineffectual location. Free miners have no right to enter upon nor to locate any ground lawfully occupied for mining purposes. A lawful location cannot be made on ground comprising part of a subsisting placer claim, nor will a subsequent abandonment or forfeiture of such subsisting claim make valid such location. Ground once lawfully occupied by a free miner must revert to the Crown before a valid re-location can be made on it.

The appellants do not seek to set aside nor curtail the grant issued to the respondent, but to have it declared that such grant did not include the ground which was, at the time of his staking, lawfully occupied as a placer mining claim, and that the extent of the respondent's grant was not added to nor otherwise altered by the renewal grant.

J. A. Ritchie for the respondent. When the plaintiff located in 1899, the ground was open for location. There is no evidence to the contrary. Even if the ground was not open for location, the defendants had no right to come and locate on ground lawfully occupied by the plaintiff.

Reference was made to *Osborne* v. *Morgan* (1888), 13 A. C. 227; *Williams* v. *Morgan* (1888), 13 A. C. 238; *Scott* v. *Henderson* (1843), 3 N. S. 115; and to Williams on Real Property, (18th ed.) p. 540.

Judgment TASCHEREAU, C.J., SEDGEWICK, J.

The CHIEF JUSTICE, and SEDGEWICK, J., were of the opinion that the appeal should be dismissed with costs.

DAVIES, J. dissenting.

DAVIES, J. (dissenting.)—This was a boundary action brought before the Gold Commissioner to determine the boundaries of the

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DAVIES, J., dissenting.

respective adjoining placer mining locations of the litigants. The Commissioner found as facts; (1). That the location of the respondent, Mercier, was staked in August, 1899, partially over a then legally existing creek claim and that such staking included the *locus* in dispute which was not then unoccupied Crown land; (2). That when Mercier obtained his renewal licence in 1900 the said creek claim had lapsed and the lands in dispute were then unoccupied Crown lands, but Mercier did not re-stake or make any new application for a licence, relying upon his former staking and application; (3). That, after Mercier's renewal licence has issued, viz., on March 7th, 1901, St. Laurent staked his bench claim covering the lands in dispute and applied for and obtained a grant or licence for the same.

Under these facts I am of opinion that the appeal should be allowed. I agree with the judgment of Mr. Justice Craig that the staking of a claim on unoccupied Crown lands is essential to the obtaining of a legal grant or licence. It is the root of title, as has been so frequently determined under the law of British Columbia.

The staking by Mercier of the *locus* in August, 1899, was invalid because, at that time, the lands in question formed part of the creek claim, No. 245, below Lower Dominion. After this creek claim lapsed these lands became unoccupied Crown lands and were never again staked or located until staked by St. Laurent, the appellant. His was the only staking or locating on which a legal grant or licence could issue and the renewal to Mercier of his original, but so far as the *locus* is concerned invalid, licence or grant could not operate to give him any legal rights in the lands in dispute.

MILLS, J.

MILLS, J.—The matter in dispute here between the parties related to a mining location in the Yukon Territory. One Waite had acquired a certain location in 1898. Subsequently, Mercier acquired a location which overlapped that of Waite by six hundred feet. Waite's location being first in point of time Mercier acquired nothing of that portion of the land embraced within it. Waite's claim lapsed and Mercier, subsequently, applied for a renewal, embracing precisely the same area which he had at first staked out and which he had applied for on the first occasion and he obtained entry for the same. St. Laurent made application for the location that had been previously held by Waite and he did this some time after Mercier's second entry.

It has been argued before us that, if Mercier desired to renew his application when there was no longer any impediment in his way, he ought to have re-staked his claim, although the stakes which he had previously placed were still standing, and the limits which he had on the first occasion marked out, while Waite's claim stood in the

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way of his obtaining a valid entry of a part of what he claimed. I do not think this is so. I think the limits of the grounds which he required being well known from what he had done, that his making application for a renewal of what he had then staked out was sufficient, as there was, at the time this entry was made, no legal impediment in the way of his getting that part of the area which he had marked out and of which he desired to obtain a valid entrance. I do not think it was necessary that he should have gone upon the ground a second time, pulled up the stakes which he had previously planted and put them again in the same places in order to obtain a proper entry for his claim in the Gold Commissioner's office. I think this would have been, under the circumstances, an altogether unnecessary proceeding and I think that the Gold Commissioner was right in recognizing the claim which Mercier had made as a valid one. He had been in possession ; he had done work on the ground; he had obtained a renewal of his original claim, and there was no power in any one to make a second valid entry. At all events, if there was any irregularity in what he had done that irregularity was not one that St. Laurent could question.

In *Osborne* v. *Morgan*, *supra*, I think the law is settled, that the party who had received here an entry after that obtained by Mercier had no right to try the validity of Mercier's claim, that this could only be questioned by the Crown. The statute, it was there said, gave no right whatever as against the land held by the Crown, and no title to try the validity of Crown leases relating thereto.

Here, Mercier had possession, and was recognized by the Gold Commissioner as having a valid claim to carry on mining operations within the area which he had marked out. When he obtained the second entry no one stood between the Crown and himself with any prior claim. The claim subsequently made was by a party who had knowledge of the claim which Mercier held under the authority of the Gold Commissioner and the recognition of such a proceeding would furnish facilities for illegal practices in those distant regions.

The acts of the Gold Commissioner are administrative acts and his decisions should, as far as possible, be supported. It would be a misfortune to have parties, many of whom are uneducated men, deprived of their claims on some technical ground and in this way pass into the possession of others. Such a course would lead to dishonest practices and sometimes to violence, and in a country so distant from the settled parts of the Dominion, it is desirable, as far as possible, to enable men who have honestly undertaken to mark out claims for themselves and to obtain entry to succeed.

Here, there is no doubt that Mercier's stakes were standing; that the limits of the ground claimed by him could be easily ascertained

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ARMOUR, J., dissenting.

or seen. This ought to have been sufficient to have warned the party who was seeking to oust him from a claim which had already been recognized by the Gold Commissioner, that he could not acquire a title to any portion of the claim.

ARMOUR, J., dissented from the judgment dismissing the appeal for the reasons stated by DAVIES, J.

Appeal dismissed with costs.

NOTE.—See *Hartley* v. *Matson*, *ante*, p. 23.

The following observations of the Privy Council in *The King* v. *Chappelle* (1904), A. C. 127, on Yukon regulations are of importance in this relation:

"The Regulations of 1889 dealt both with quartz mining and placer mining, and, as might be expected, they dealt with the two methods in a different manner. The quartz miner having complied with the prescribed conditions, and having paid the required fee, obtains from the agent of Dominion lands a receipt according to Form B. in the schedule, authorizing him to enter into possession of the location applied for, and subject to its renewal from year to year as "thereinafter" provided during the term of five years from its date to take therefrom and dispose of any mineral deposit contained within its boundaries, "provided that he expends during each of the five years a sum of at least $100 in actual mining operations on the claim." Thereupon, subject to the payment of the prescribed fee, the agent issues another receipt in Form C in the schedule, which entitled the claimant to hold the claim for another year. At any time before the expiry of the five years the claimant is entitled to purchase the location at so much per acre on proving that he has complied with the requirements of the regulations in that behalf. As regards placer mining, the forms of application for a grant for that purpose and the grant for the same were to be those contained in Forms H and I in the schedule, and it was provided by s. 20 that "the entry of every holder of a grant for placer mining must be renewed, and his receipt relinquished and replaced every year, the entry fees being paid each time." According to Form I the Minister of the Interior grants to the claimant "for the term of one year . . . the exclusive right of entry upon the claim" as described, "for the miner-like working thereof, and the construction of a residence thereon, and the exclusive right to all the proceeds realized therefrom." Form I then proceeds to state that the grant does not convey any surface rights in the claim or any right of ownership in the soil covered by the claim, and that the rights granted are those laid down in the Mining Regulations and no more, and are subject to all the provisions of the said regulations, whether the same are expressed in the grant or not. . . . .

Their lordships, therefore, are of opinion that the placer miner on renewal holds under an annual grant in substitution for, but not in continuation of, his original grant. He has no absolute right to renewal. He has no doubt a preferential right of renewal, because no interloper can be in a position to make the affidavit required to entitle him to a grant of the claim so long as the original occupant complies with the requirements of his grant and applies in due time for a renewal.

Their lordships are further of opinion that a placer miner obtaining a renewal grant in due course, holds his claim subject to all such regulations as may be in force at the date when the renewal grant comes into operation.

In some cases it appears that for the convenience of the miner a renewed grant was issued during the currency of an existing grant. It was argued that the miner, having got possession of a renewal grant, was not liable to be affected by regulations not then in force, but coming into operation before the expiry of the existing grant. Their lordships are unable to accede to this argument. Their lordships think that a renewal grant must be subject to all regulations in force at the date when it comes into operation."

BRITISH LION GOLD MINING CO. v. CREAMER.

Mineral Claim—Over-location—Misnomer—"Swinging" Claim—Fraud—Misleading—Curative Section, s.-s. (g) of sec. 16 of Mineral Act.

A claim which is located under one name and recorded under another is invalid, and such a defect in location being necessarily calculated to mislead other locators in the vicinity, cannot be cured by s.-s. (g) of sec. 16 of the Mineral Act Amendment Act, 1898.

Statement.

ADVERSE action tried before MARTIN, J., at Nelson, between two conflicting and over-lapping mineral claims, the Aberdeen, the senior location, being the property of the defendant, and the Highland Chief, the junior location, being the property of the plaintiff company. The Aberdeen was attacked on the grounds (1) that it did not occupy the same position as that in which it had been originally located, *i.e.*, that the location had been "swung;" and (2) that it was a re-location of its owner's former claim, the Salsberry, without the permission of the Gold Commissioner.

Argument.

S. S. Taylor, K.C., for the plaintiff. Our claim, the Highland Chief, has been shown to be a valid location. I submit that apart from other objections to the Aberdeen location, the evidence establishes the fact that the ground now covered by that claim was located as the Salsberry, and that since then the location of the Salsberry claim has been changed, *i.e.*, "swung," and the name on all the posts changed to Aberdeen. This involves a grave charge against the defendant, who has not seen fit to come here to meet it, though he could have done so. In any event it is established beyond question that there has been a misnomer of this claim, for even assuming it was by mistake that the name was changed in the course of the various shuffles resorted to in trying to hold the ground without doing assessment work, yet there cannot be a valid location which has one name in the Mining Recorder's office and another name on the ground, and it is impossible to cure such a defect because it must necessarily mislead all others seeking to locate in that vicinity. And further, assuming that the Aberdeen was merely an over-location of the Salsberry, when once it appears that that is the case the *onus* is on the other party to show that he obtained the consent of the Gold Commissioner before he made such re-location, which is otherwise illegal.

W. A. Macdonald, K.C., for the defendant. The Aberdeen is the senior location, and we having given formal proof of the validity thereof, the *onus* is on the plaintiff to establish his objections

Argument. to our title. It has not been clearly proved, as it must be, that the Aberdeen was fraudulently "swung," and the most that can be said is that there was a mistake in the name—a misnomer—which can be cured by sub-section (g) as, in the circumstances, it was not calculated to mislead. As to the Aberdeen being a re-location of the Salsberry without permission, it is not open to the plaintiff to attack us on that ground without joining the Attorney-General as a party, and further the consent of the Gold Commissioner must be shewn to be wanting because it will be presumed in our favour that it was obtained.

Judgment. *Per* CURIAM:—Apart from any question as to re-location without permission, I find as a fact that the location called the Aberdeen as now surveyed was, at the time of the location of the Highland Chief, located as the Salsberry, and the record of the claim in the Recorder's office and the notice on the posts on the ground are consequently in conflict. It is alleged that the Aberdeen claim has been fraudulently "swung," and the posts changed so that it now covers the ground located as the Salsberry, and the Court is asked to declare it invalid on that ground also. For the reasons given by myself in *Callahan* v. *Coplen* (1899-1900), 1 M. M. C. p. 349; 6 B. C. 523; 7 B. C. 422, I should shrink from finding that the defendant has been guilty of a gross fraud unless it is necessary to do so and the fact has been clearly established.* I must say that to meet such a grave charge I should certainly have expected the defendant to be here. It is, however, not necessary to decide it because in any event the location is invalid both because of the misnomer and of failure to duly record it in its true name, and the irregularity is one which cannot be cured by sub-section (g) of section 16, because on the face of it nothing could be more calculated to mislead other prospectors than a misnomer of a mineral claim and a conflict between the record and the notices on the posts.

The Highland Chief is declared to be a valid location and the Aberdeen as now surveyed declared to be an invalid location so far as it conflicts with the Highland Chief.

Judgment for plaintiff with costs.

NOTE.—In *Wise* v. *Christopher* (1900), 1 M. M. C. 413, the location was held to have been swung and consequently invalid.

For list of other fatal defects in location: see Vol. 1, p. 504; and also *Snyder* v. *Ransom*, *post*, p. 77; *Sandberg* v. *Ferguson*, *post*, p. 165; *Docksteader* v. *Clark*, *post*, p. 192; and *Rutherford* v. *Morgan*, *post*, p. 214.

*Cf. *Docksteader* v. *Clark*, *post*, p. 192, at 194, IRVING, J.

GUNN v. LE ROI MINING CO., LTD.

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June 16.

FULL COURT.

(10 B. C. 59.)

Master and Servant—Unsafe Mine—Negligence—Employers' Liability Act—Place of Danger—Duty to Warn Workmen of.

Where a workman is put to work in a place in a mine where there is an imminent danger of a kind not necessarily involved in the employment and of which he is not aware, but of which the employer is aware, it is the latter's duty to warn the former of the danger.

G. had been working in the defendants' mine on the floors immediately below the 600 foot level, and on the night of the accident when he was going to work he was told by the shift whom he was relieving that the place was in "pretty bad shape," and to look out for it. He proceeded to make an examination, but while thus engaged the mine superintendent directed him to do some blasting, and while doing it a slide occurred and he was injured. The principal indications of the probability of a slide were in the two floors beneath the 600 foot level, and of these the superintendent was aware, but G. unaware. The jury found that the superintendent was negligent inasmuch as he did not warn G. of the probable danger.

Held, in an action under the Employers' Liability Act, MARTIN, J., dissenting, that the defendants were liable.

Statement.

THIS was an action under the Employers' Liability Act. The plaintiff had been working in the Le Roi mine in Rossland on the floors immediately below the 600 feet level. On the night of the accident he went on shift at eleven o'clock, and when near the place where he was to work was told by the shift whom he was relieving that the place was in "pretty bad shape" and to look out for it; he then proceeded to make an examination of the timbers along the sill floor of the 600 foot level to ascertain the extent of the danger; while engaged in this examination the defendants' superintendent came along and directed him to blast away the lagging, which was sustaining a large amount of waste rock above the 600 foot level. It was shewn at the trial that some twelve hours before the plaintiff went to work the timbers in the stope underneath the 600 foot level had begun to crack and get out of position and give other evidences that a slide was inevitable.

The defendants' superintendent was aware of all the evidences of the coming slide, but the plaintiff was unaware of the same except in so far as they could be observed on the sill floor of the 600 foot level. The principal indications of the coming slide were in the two floors beneath the 600 foot level, and these were not visited by the plaintiff. The plaintiff and the man who was engaged with him

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had blasted twice in conformity to the order of the superintendent without bringing down the waste rock; while they were preparing the third shot the slide came and the plaintiff was severely injured. Dunkle, the superintendent, was killed.

Judgment below, IRVING, J.

The action was tried at Rossland in February, 1903, before IRVING, J., with a jury, who returned the following verdict:

(1) Was the injury to the plaintiff caused by the negligence of any person in the service of the company who had superintendence entrusted to him, whilst in the exercise of such superintendence? Yes, inasmuch as Superintendent Dunkle did not advise the plaintiff of the probable danger.

(2) If yes, who? Superintendent Dunkle.

(3) Was the injury to the plaintiff caused by reason of the negligence of any person in the service of the company to whose orders the plaintiff was bound to conform and did conform? No; we have no evidence to shew that such accident was caused by the order given for blasting.

(4) Did the injury result from his having so conformed? We have no evidence to shew that it did.

(5) Did the plaintiff, knowing the nature and the condition of the ground and fully appreciating the risk of accident he ran by working in the stope referred to, under the circumstances voluntarily assume to take such risk upon himself? No.

(6) Was the injury of which the plaintiff complains caused by reason of any defect in the condition or arrangement in the premises by reason of any defect in the construction of the scaffolds or other erections erected by defendants or in the material used in the construction thereof? We do not think so.

(7) If you say in answer to question 6 that there was any negligence in making the erection or in not discovering the defects or in not remedying the defects, in what did such negligence consist? We believe the necessary precautions were taken to remedy the defects on the 11th and 12th floors.

(8) Amount of damages? $2,000.

Judgment was entered for plaintiff accordingly.

Appeal.

The defendants appealed, and the appeal was argued at Vancouver on the 20th of April, 1903, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Argument.

Davis, K.C., for appellants: Under the circumstances there are only three classes of negligence which the jury could find and on

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which the plaintiff could hold a verdict: (1) they might find antecedent negligence in superintendence in allowing the mine to get in such a dangerous condition; (2) they might find a negligent system of timbering; or (3) they might find that the superintendent's order to go in and blast was a negligent order because the place was too dangerous.

There is no such finding; the whole finding is negligence because superintendent did not warn. It is no part of a superintendent's duties to warn workmen and thus give them a chance to decide for themselves; he is to decide whether it is safe or not, and then either send them in or keep them out. There is no answer to the question as to whether or not the order was a negligent one.

A. H. MacNeill, K.C., for respondent: Employers are bound to warn their workmen when they are sent into a dangeous place. The superintendent was a young man and he wanted to make a reputation by getting the mine out of its dangerous condition, and in consequence was reckless. That there is a duty to warn, see *Farrant* v. *Barnes* (1862), 11 C. B. N. S. 553; section 3 of the Employers' Liability Act; *Saxton* v. *Hawksworth* (1872), 26 L. T. N. S. 851; Beven, 746; *Aitken* v. *Newport Slipway Dry Dock* (1887), 3 T. L. R. 427; *Osborne* v. *Jackson* (1883), 11 Q. B. D. 619; *Smith* v. *Baker & Sons* (1891), A. C. 325 at p. 338, judgment of Lord Halsbury; *Davis* v. *England and Curtis* (1864), 33 L. J., Q. B. 321; *Roberts* v. *Smith* (1857), 26 L. J., Ex. 319 and *Cowley* v. *Mayor, &c., of Sunderland* (1861), 6 H. & N. 565.

Davis, replied.

Cur. adv. vult.

16th June, 1903.

Judgment.

HUNTER, C.J.:—I think the appeal ought to be dismissed, and that there is nothing to be gained by sending the case to another jury. The evidence clearly shews that the plaintiff was put to work in a place where there was obviously imminent danger that he would be either killed or injured by falling rock. The cave-in, which the superintendent knew had begun several hours before he put the plaintiff to work, occurred an hour and a half afterwards, and the circumstances clearly raised a duty on his part to tell the plaintiff the nature of the risk, so that he would have an opportunity of saying whether or not he would take it.

In my opinion, the law is too clear for argument that the master cannot expose his servant to an obvious danger which is unknown to the latter, and which is of a kind not necessarily involved in the employment without warning him beforehand of its nature, and it is, perhaps, needless to add that the servant's life has a higher claim to preservation than the master's property.

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DRAKE, J.

DRAKE, J.:—This is an action under the Employers' Liability Act, the claim under the common law having been abandoned by the plaintiff.

The facts are the plaintiff was working in a floor above the 600 foot level; the object was to bring the dirt which had accumulated above the 600 foot level down so as to make a solid foundation, and relieve the pressure on the timbering of the mine; there were thirteen floors above the 600 foot level, and the plaintiff was engaged in blasting above this level. While so doing, the floor on which he was working gave way and precipitated him below, whereby he was injured. The only point which Mr. Davis, for the defendants, argued, was whether the defendants could be held responsible without shewing that there was negligent superintendence in allowing the mine to get into a dangerous condition, which includes negligent timbering, and whether Dunkle's order, who was superintending the plaintiff's operations, was negligent in ordering the plaintiff to do the work he did. The blasting which was done was not the cause of the accident. .The jury found that Dunkle did not advise the plaintiff when he gave the order of the probable danger existing. Mr. Davis' contention is that Dunkle could not leave the question of danger or no danger to the workmen; he must take the responsibility on himself, and he should refuse to send the men in where there was danger; if he knew there was danger and then sent them in, he gave a negligent order. The question is, was the order Dunkle gave a proper order or not? If it was an improper order the defendants are liable. The facts shew that there was evidence of great pressure in the timbering, and the previous shift considered the work dangerous from fear of a caving-in.

The plaintiff himself made a careful examination of a portion of the timber and saw signs of pressure; Dunkle also made examination, and after that he told the men to go on with the work, and remained with them looking after them. The reasonable deduction is that Dunkle did not think there was any immediate danger, for it is not to be presumed that Dunkle, who was a competent man, would run a risk which caused his death as well as injury to others. This brings us to the question, whether it is the duty of a superintendent to notify the employees of any special danger; this involves the question of whether there was any special danger beyond the ordinary risk of a miner's employment. Dunkle thought there was none, at least that is the presumption, because he placed himself in such a position that any cave-in must have injured him if it took place. The cave-in occurred much sooner than was anticipated. The plaintiff obeyed the order to go to work at the place where the accident occurred, and Dunkle

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was the person to whose orders he was to conform. Such being the case, although Dunkle might have committed an error in judgment, the company will be liable for an accident under section 3 of the Employers' Liability Act, if it is caused by some negligence of a person to whose orders the plaintiff is bound to conform, or by reason of any defect in the condition or arrangement of the plant, or by reason of a defect in the construction of any creation erected by or for the employer. Was there negligence in Dunkle giving the order to the plaintiff? Dunkle had satisfied himself there was danger of a cave-in. Such being the case, he should have warned the plaintiff. The evidence discloses that a great pressure was imposed on the timbering of the mine, so that the defendants thought it absolutely necessary to put more timbers to prevent a collapse; the mine was in reality dangerous owing to this pressure on the timbers, which were getting out of plumb. The defect was being remedied at the time of the accident.

In this case the jury have found that Dunkle was negligent because he did not advise the plaintiff of the probable danger; and they further find there was no defect in the construction of the scaffold and other erections, or in the material used. The jury having found negligence, not because Dunkle gave a negligent order, but because he did not advise the plaintiff of the probable danger, I think whether the order given was with a knowledge of the danger or not is not the question. I will suppose Dunkle thought there was no serious danger, but he was mistaken, and the plaintiff was bound to conform to his directions or lose his job. Under these circumstances, the plaintiff was doing that which he was ordered to do when the accident occurred, and he is, in my opinion, entitled to held his verdict and the appeal should be dismissed.

MARTIN, J., dissenting.

MARTIN, J.:—A further consideration of this case confirms the opinion I formed during the argument, which was, that seeing it clearly appears by the evidence that the nature of the accident was such that after the plaintiff was ordered to go in and blast where he did a warning of the pending danger would have been useless to him, because by no additional caution or alertness could he have protected himself from it, therefore, in view of the other findings, the only remaining question was, and still is, was the order a negligent one under the circumstances? Until that question is answered no progress can be made in the determination of the real issue herein, nevertheless there was no finding thereon though much evidence was directed to it. Where the circumstances are such that a warning given after an order would enable the workman to avert an accident or even lessen its consequences, it would be negligent not to give it, but that is not the present case.

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MARTIN, J., dissenting.

It is plain that an employer cannot escape liability for the consequences of an improper order of his foreman directing workmen to go into a place of known danger merely by the foreman adding, after giving the order, that there was danger there. In such case the mind of the workman would be oppressed by the fear of probable dismissal for disobedience, and also, most likely, fired by a spirit of bravado because of the disinclination of being laid open to a charge of cowardice.

In the case at bar, what must be determined by the jury is, was the foreman in the exercise of the reasonable judgment of a competent man justified, under all the circumstances, in giving the order? That is the basis of this whole action, and the only point meriting consideration on this appeal. The learned trial Judge instructed the jury on the very point, but there is so far no finding on it. Consequently there should, I think, be a new trial, the costs of which and of the former trial will abide the event, and this appeal should be allowed with costs.

Appeal dismissed, Martin, J., dissenting.

NOTE.—For some other cases on accidents in mines: see note to *Stamer* v. *Hall Mines* (1899), 1 M. M. C. 314; and *McKelvey* v. *Le Roi No. 2, Ltd.*, *ante*, p. 13; *Hastings* v. *Le Roi, No. 2*, *post*, p. 81; and *Hosking* v. *Le Roi, No. 2, Ltd.*, *post*, p. 100; *Leadbeater* v. *Crow's Nest Pass Coal Co.*, *post*, p. 145.

LE ROI CO. NO. 2, LTD., v. NORTHPORT SMELTING & REFINING CO., LTD., AND THE LE ROI MINING CO., LTD.

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FULL COURT.

(10 B. C. 138.)

Smelting Contract — Sampling Ores — Automatic or Hand Sampling—Mine-Owner's Representative at Smelter—Authority of—Ores Improperly Sampled —Method of Estimating Values of—Principal and Agent.

A contract between mine owners and smelter owners provided *inter alia* that the ores supplied by the former to the latter should be sampled within one week after shipment. The evidence shewed that "automatic" or machine sampling had displaced the old method of "grab" or "shovel" sampling and had been in vogue for about twenty years:—

Held, (WALKEM, J., dissenting), that the contract permitted either mode of sampling so long as it was so done that the true value of the ore was arrived at.

Per CURIAM:—A mine owner's representative at a smelter for the purpose of watching the weighing and sampling of ores so that the mine owner may be satisfied as to the correctness of the weight and sampling, has no authority to consent to a method of sampling not allowed by the contract.

Where the smelter returns of ore of average character sampled either negligently or in a manner not contemplated by contract, shew a value below the average, the probable value of the ore will be estimated by the Court by taking the average value of a certain number of lots immediately before and after the lots in dispute.

Decision of HUNTER, C.J., reversed in part.

Statement.

THIS was an appeal from a judgment of HUNTER, C.J., delivered 5th February, 1903, ordering that the plaintiffs should recover from the defendants, the Smelting Company, the sum of $3,974.70 and costs.

The action was tried at Rossland in October, 1902.

The facts appear from the judgments.

Argument.

J. A. Macdonald, for plaintiffs.

Hamilton, for defendants.

5th February, 1903.

Judgment below, HUNTER, C.J.

HUNTER, C.J.:—On the 16th of August, 1901, a contract was drawn up between the plaintiffs and the two defendants for the smelting of the plaintiffs' ores at the smelter of the defendant company at Northport. The contract was drawn up by Bernard MacDonald, who was at that time general manager of all three companies, but through inadvertence, as he says, was not executed, on behalf of the

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Le Roi Mining Company, and they were therefore dismissed out of the suit as the action is brought on the contract. Notwithstanding this, they remain the real defendants in interest as they are the owners of 999,995 out of the 1,000,000 shares of the Northport Smelting Company.

The contract provides, *inter alia*, for the sale of the output of the plaintiffs' mines for two years, to the Smelting Company at certain figures for the constituent metals therein named, after deducting $6 per ton for freight and treatment, that weekly statements shall be furnished by the smelter shewing the weight and assays and amounts due to the mine, and provides for payment to be made within three days from date of statement. It further provides as follows:

"That the ores shall be sampled within one week from date of shipment from the mine of the party of the second part. It is understood and agreed that the party of the second part (the mine), through its representative, shall have access at all times to the smelter of the parties of the first part, and the weighing and sampling of the ores to the end that they may satisfy themselves as to the correctness of the weights and sampling, and that they shall be allowed a control sample for assay purposes. A sample shall also be taken by the parties of the first part so that in the event of the assays made by the parties hereto not agreeing, an umpire assay can be made by a party mutually agreeable to the parties hereto. A final settlement shall be made by the parties of the first part on the umpire assay so determined; the cost of such umpire assay to be borne by the party whose assay is the farthest away from assays as shewn by said umpire."

Judgment below, HUNTER, C.J.

The plaintiffs allege that in May last certain car-loads of ore composing lots 295, 296 and 297, were sampled in a manner not authorized or contemplated by the contract, that is to say, they were shovel or grab sampled without their consent or permission instead of being automatically sampled, with the result that they have been allowed an amount far short of their real value. While the defendants admit that part of the ore was so sampled, they say that it was done with the assent of the plaintiffs' representative, and contend that in any event the contract does not say that only automatic or mechanical sampling shall be resorted to.

First, as to the meaning of the contract. Taylor on Evidence, at p. 761, says:

"It is, however, also a principle that, parol evidence may in all cases of doubt be adduced, to explain the written instrument; or, in other words, to enable the Court to discover the meaning of the terms employed, and to apply them to the facts. Such a 'doubt' as is here meant may arise from one or both of the following causes; either the language of the instrument may be unintelligible to the Court, or at least, be *susceptible of two or more meanings*," etc.

It was practically conceded on all hands that the old method of grab or shovel sampling has been displaced for about twenty years by automatic or mechanical sampling, and that every properly equipped smelter is provided with one or more mechanical samplers. More-

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over, MacDonald, who drew up the contract and executed it on behalf of both signatories, and who was, as already stated, the general manager of all the companies concerned, testified that he had in his mind the mode in general use and which was in use at the smelter. Therefore, I have no difficulty in coming to the conclusion that this contract was entered into on the footing that the ores should be automatically or mechanically sampled.

But the defendants say that even if this is so, Luce, the plaintiffs' representative, had authority to, and did, sanction the shovel sampling of the ore in question. I do not think so. All that Luce had authority to do under this contract was to watch the weighing and sampling, nor do I see anything in the contract itself which would warrant him in consenting to the mode of sampling being altered, and so far as any instructions to him are concerned, MacDonald and Thompson both testified that he had no authority to permit any deviation from the contract without first obtaining their instructions to do so. It cannot reasonably be held to have been in the minds of the parties that the smelter could use any mode of sampling, no matter how perfunctory it might be, to suit its pleasure or convenience, subject only to the chances of it being discovered and objected to by the mine's representative, both because the ore was being smelted day and night, and of course the representative could not always be on hand, and because it is beyond controversy that to properly sample ore by the grab or shovel method is much more tedious and costly than by the mechanical method. Nor can I find as a fact that Luce did authorize the sampling complained of. He himself says that on the 21st of May he discovered that ore was being taken to the high line bunkers and thence to the roast heaps without being passed through the crusher to which the automatic sampler was attached; that he hunted up Gray, the yard foreman, and said to him, "I see you are running some No. 2 (*i.e.*, plaintiffs' ore) to the high line," to which Gray answered "Yes, the railroad company and the mines were hollering for cars and I couldn't see any other way to move them except to run part of it up here," that he (Luce) then said "I don't like this at all. I'm afraid it will not be satisfactory;" that Gray replied, "I don't know; I think we are getting a good sample of it, aren't we?" to which he said, "Possibly, so far as a grab sample goes, and as it has been done, I suppose it can't be helped now, and I suppose I will have to make the best of it, but I am afraid there may be trouble about it," and that he reported the matter by telephone to Thompson, who came down the next day and prohibited any more ore from being smelted unless put through the crusher in the usual way.

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Some time before this, in February, Thompson had given instructions to Luce to allow portions of a lot or lots, but not entire lots, to

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go through to the furnace without crushing when it became absolutely necessary by reason of the crusher getting out of order, and to see that a proper sample was taken, but obviously this would not warrant the smelter in adopting this course of their own motion, especially in a wholesale way, and without having secured Luce's permission, which it was admitted was not done on this occasion, nor would it warrant the smelter in running the ore direct from the bunkers to the roast heaps, which was admittedly done with a large portion of the ores in question. Luce's evidence is in part corroborated by Szontagh, the smelter manager, as he says that Luce said that "under the circumstances the lots could not have been sampled in any different way," that is that Luce conceded that, on account of the congestion in the yards and the disabled crusher, they could only be shovel sampled. But I do not see how this can be construed into a ratification by Luce of the perfunctory way in which the shovel sampling, as shewn by the evidence, was carried out, even if he had power to ratify, which I think it is clear he had not. He is also corroborated by Gray, the yard foreman, who admits that Luce did not know about the ore being taken up to the high line until he found part of the ore run out on the roast heaps, and he does not dispute that Luce said he was afraid it would not be satisfactory. Crist, the sampler, also corroborates Luce, because he says he remembers Luce saying to him that "this method was not satisfactory to his people."

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I, therefore, find the facts to be that Luce was not asked for permission to shovel or grab sample any of these ores; that he discovered that this was being done only when it was too late to stop operations, and that he warned the smelter that this method was not likely to be accepted as satisfactory. I find further, that his authority extended only so far as to give permission when absolutely necessary by reason of the crusher being out of order, to shovel sample portions of lots, and not entire lots, and to take such portions to the furnaces to prevent them from "freezing," but not to put them on the roast heaps.

With respect to the lots themselves: according to the defendants' contention lot 295 was mechanically sampled, because it appears from Gray's yard book that this lot was all sent to the crusher. But it does not follow from this that it was all mechanically sampled, as it was admitted that although the sampler had been connected with the Blake crusher, the Comet crusher which was commonly used having broken down, the Blake crusher could not receive any piece of ore that was larger than eight inches in diameter, so that part of the coarser ore was not sent through the sampler, but was hand sampled if sampled at all, and it was proved to my satisfaction that the

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"coarse" ore of this mine ordinarily carries higher values than the "fines."

If, therefore, I am right in concluding that the plaintiffs' ores could only be shovel or grab sampled under this contract by express permission to be got from them or their representative, Luce, then there was an unauthorized mode of sampling adopted in connection with a portion of this lot, and therefore the true contract value of this lot has not been ascertained or accounted for.

As for lots 296 and 297, the defendants practically admit that these were not automatically sampled, and that parts of them were put on the roast heaps without the knowledge or permission of the plaintiffs or their representative.

The defendants sought to prove that between January 19th and March 6th, portions of a number of lots were hand sampled without objection by the plaintiffs, but even if this were so, this goes only to corroborate the contention of the plaintiffs, which is that the permission to hand sample, when given, extended only to portions of lots, and not to entire lots, and in the next place, even if no express permission was given in these instances the plaintiffs may have considered the results sufficiently fair so as not to make it worth while to object to the returns in respect of these lots. But even if the contract could be construed so as to allow shovel or grab sampling, I think it cannot be gainsaid that on the evidence the sampling of these lots was of a very perfunctory and careless character. It was shewn in the case of lots 296 and 297 that the proportion taken was not more than (three) pounds out of 1,000 pounds, indeed it was generally less, and that the larger pieces, which carried the higher values, formed no portion of that set aside for the sample, and the same thing occurred, although perhaps in a lesser degree, with that part of lot 295 which did not go through the sampler, assuming that what did not go through the sampler was sampled at all, as to which I feel very much doubt. It was also shewn as much by the candid evidence of the defendants' manager, McKenzie, as by any other, that the mode of sampling employed was far different from the standard mode in use in the days of sampling by hand or by shovel.

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My conclusion then is, even assuming that the defendants were empowered either under the contract or by permission to use the shovel or grab sample method (which I think they were not) that they did not sample the plaintiffs' ores in the manner which the plaintiffs had a right to expect, and that it would have been a miracle if anything like accurate results had been attained.

But Mr. Hamilton seeks to lessen the liability of the defendants by contending that there is no room for complaint as to one-half of the ore, as it was composed of "fines," and that the values returned

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might be adopted as the true value of the "fines," and because some of the ore was automatically sampled. It seems to me that this is obviously fallacious as a careless and insufficient sampling would clearly be just as unreliable in the case of the "fines" as of the "coarse."

Then what method should I adopt in order to estimate the probable value of this ore? I think that the fairest and most equitable way is to take the average value of say 10 lots immediately before and after the lots in question, especially as it has been sworn by the plaintiffs that so far as they know the ore was of the same character as that shipped immediately before and after, and no good reason has been suggested for supposing that there was any unusual difference, and it is quite impossible to suppose that the plaintiffs could have foreseen the breakdown, and taking it for granted that the ore would be improperly sampled, knowingly shipped practically worthless ore.

Then taking such average I find it to be $8.58 net per ton, so that the account would stand thus:

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Lot 295	219.888 tons at $8.58	$1,881.69	
	Less paid on account	508.75	
	Bal. due		$1,372.84
Lot 296	226.155 tons at $8.58	$1,940.41	
	Less paid on account	266.86	
	Bal. due		$1,673.55
Lot 297	215.574 tons at $8.58	$1,833.62	
	Less paid on account	905.41	
	Bal. due		$ 928.21
	Total amount due		$3,974.60

I think the plaintiffs are entitled to judgment for this amount with costs, subject to the correction of any errors in the calculation.

Appeal.

The defendants appealed and the appeal was argued at Victoria on the 4th and 5th of June, 1903, before WALKEM, DRAKE and IRVING, JJ.

Argument.

Hamilton, for appellant: Lot 295 was sampled automatically; the Chief Justice in finding to the contrary confounded the two crushers, as the Blake crusher could receive larger pieces of ore than the Comet.

The contract does not require automatic sampling; under it the samples may be taken in any way; MacDonald's evidence of what

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sort of sampling he had in his mind at the time the contract was entered into should not have been admitted. A crusher was broken down and it became necessary to hand sample some of the ore; this had been done on previous occasions without objection: see *Harrison* v. *Bdrton* (1861), 30 L. J., Ch. 213. In any event, Luce, the plaintiffs' representative, had authority to sanction and did sanction hand sampling.

The measure of damages should be the difference between the value of the coarse and fine ores, and as half was fine and half coarse and the fine was satisfactorily sampled, the value of only half of the lots has to be settled.

J. A. Macdonald, for respondents: Extrinsic evidence is admissible to shew that the contract was made subject to the usage or custom of the business of smelting: see Leake on Contracts, 4th Ed., 127; automatic sampling has been in vogue for twenty years; it was what all the parties expected would be used and that on which we have a right to insist. Luce was not a skilled man; his duties were mechanical, and he had no authority to consent to any deviation from the contract; at any rate he did not consent to the hand sampling; before adopting another method of sampling, Luce, or the plaintiffs, should have been notified. The defendants cannot escape liability for their wrongdoing by saying there was a breakdown. He referred to *Jordon* v. *Money* (1854), 5 H. L. Cas. 185, and *Chadwick* v. *Manning* (1896), A. C. 31.

As to measure of damages, the rule should be that where a smelting company improperly samples ores it should be presumed as against the company that the ores improperly sampled were of the highest value: see *Armory* v. *Delamirie* (1821), 1 Str. 505; *Clunnes* v. *Pezzey* (1807), 1 Camp. 8; and *Duke of Leeds* v. *Earl of Amherst* (1850), 20 Beav. 239.

As to lot 295 there is doubt as to how it was sampled, and in estimating the values of lots 296 and 297 the value of 295 should not be taken as a basis of value.

Hamilton, replied.

Cur. adv. vult.

22nd June, 1903.

Judgment.

WALKEM, J.:—The Le Roi Company No. 1 has been dismissed from the action by the learned Chief Justice.

This is an appeal by the Smelting Company from his decision. I agree with him that the ore sent to the Smelting Company was to be automatically sampled, and not hand sampled. According to the evidence, the smelter was a "custom smelter" and its attraction

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for business was its automatic process for sampling ore instead of the process of hand sampling, which had been discarded for more than twenty years, as the new process was more expeditious and more productive to the owner of the ore. The written agreement between the parties to the action does not specify which kind of sampling was to be adopted, and this has occasioned the present litigation.

As it happens, the Smelting Company's crusher broke down during the process of crushing. It has, therefore, been contended that as no special process of sampling has been provided for, the Smelting Company had the right to hand sample the plaintiff company's ores as it did, and apparently from the figures before us, at a loss to the plaintiff company.

But, it must be borne in mind that the Smelting Company held itself out to the mining community as being a company that would give its customers the most profitable results by means of automatic smelting.

Usage in smelting is subject to the same rule that applies to usage in any other business. On this point Mr. Macdonald has referred us to the following passage in Leake on Contracts, page 127:

> "Extrinsic evidence is admissible to shew that a contract in writing was made subject to a usage or custom of the trade or business to which the contract relates, impliedly binding the parties to certain usual or customary terms and conditions not mentioned in the writing. The contract in truth is partly express and partly in writing, partly implied or understood and unwritten. The effect of the terms introduced by usage is the same as if they were written in the contract. . . . The intention of the parties to exclude a usage of trade, or to vary its effect, must appear in the writing; parol evidence is not admissible for that purpose." . . . .

Consequently, if the Smelting Company had intended to resort to hand sampling in case of an accident to the company's machinery, it should have had a provision inserted in the contract which would have enabled it to do so.

This, is, however, immaterial, as I think my brother DRAKE'S figures with respect to what the plaintiff company is entitled to are, for the reasons he gives, correct.

The appeal should be dismissed with costs.

DRAKE, J.

DRAKE, J.:—The only question in dispute herein is one of fact. The large crusher belonging to the defendant company broke down, and the defendants sampled the ores in lots 296 and 297 by hand instead of automatically; that is, they took a sample either by shovel or hand out of each small ore car, which contained about three-quarters of a ton. The ore was then crushed, not automatically, and a sample taken, the result of which proceeding is that the fine or small ore is assayed, and not the lumps over three inches in diameter.

The fine ores are not so rich in mineral as the larger pieces, which are all hand picked at the mine, and in consequence the general average is reduced. It was quite possible to take the larger pieces and break them up by hand and then put them through the crusher, but this was not done.

It is admitted by Luce, the representative of the mine, that the fine ores were not improperly sampled, but the question is did this mode of sampling give a return equal to the return given by the automatic crusher? The evidence is clear that it did not. MacDonald says, at p. 32, that "ore sampled in this way would not be a representative sample." It would be impracticable to get a good sample unless all the coarse ore was broken up, and this apparently was not done.

The defendants contend that under the contract made on the 16th of August, 1901, the term "sampling" includes any mode of sampling by which the value of the ore is arrived at, and is not limited to sampling automatically; and I think that is the true meaning of the contract. But if sampling is done otherwise than automatically, it should be done in such a manner as to give a similar or nearly similar result. The cars 296 and 297 shew a great falling off in values—$8.30 and $10.20 as against $14.20, the previous car 294, and $15.99 for car 298.

With regard to car 295, the evidence is conflicting whether it went to the crusher or not. Luce, whose duty it was to watch on behalf of the plaintiffs, was not apparently attending to his duties, and is unable to say what became of this lot, except what somebody told him. According to the yard book kept at the smelter, lot 295 went to the crusher; so did part of 296 and 297, but there is no evidence clearly shewing that the samples from the latter were taken from the automatic sampler, or from the shovel or hand samples; and in my opinion, as the defendants had the control of the sampling, and could have divided it, if they so pleased, the learned Chief Justice was justified in estimating the damage to the plaintiffs based on average returns, although it is not improbable that such an estimate might give an excess to the damage sustained by the plaintiffs. This is unavoidable, as it was not possible to make a check assay from other portions of the samples. Mr. Hamilton, in his careful analysis of the mode in which, from his point of view, the damage should be estimated, has lost sight of the fact that there is no evidence that lots 296 and 297 were assayed from other than hand samples. There is evidence from the yard book that some portion of these lots were crushed, and he therefrom deduces the fact that it is only the difference between the amounts that were automatically sampled and hand-sampled that can be looked at to ascertain the shortage. As to lot 296, consisting of 141.346 tons, 84,809 were automatically

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sampled; and as to lot 297, half hand-sampled and half automatically. There ought in such case to be produced the assays from each class of samples. This was not done, and there is therefore no criterion of actual values. In my view I think I should give $14 a ton for 296 and 297, and as regards 295, the evidence I think is sufficient to shew that this lot went to the crusher in the ordinary way, and although the proceeds are low, I do not think that reason sufficient to overweigh the evidence produced by the yard book, which appears to have been kept in the ordinary way, and Luce, who apparently was not in the smelter at the time, cannot dispute the evidence adduced.

The result, in my opinion, varies but little from the amount which the Chief Justice has arrived at. He has added $8.58 to both lots, although lot 296 realized $8.30, while 297 realized $10.20. This would make the return for lot 296, $16.80, and 297, $18.78. I think the damages should be reduced to $2,550.98.

IRVING, J.

IRVING, J.:—From the evidence, in particular from the entries in the yard book, it appears to me to be beyond question that lot 295 was passed through the crusher, so that we only have lots 296 and 297 to deal with.

In my opinion, the contract permitted samples to be selected in either way, but there was an implied term that by whichever way it was to be done, they were to be selected honestly and fairly, and a reasonable opportunity given the Le Roi Company to be present if not selected automatically. I agree with the Chief Justice that the defendants did not sample lots 296 and 297 in the manner in which the plaintiffs had a right to expect. I also agree with the Chief Justice that there was a breach on the part of the defendants of the concession granted by the plaintiffs that the defendants might (in the absence of the plaintiffs' officer) take ore when actually necessary to prevent the furnaces from freezing.

Lot 296 consisted of eight cars, of which five cars were hand sampled and three cars automatically sampled; the total tonnage being 226 tons. Lot 297 consisted of eight cars, of which four were hand sampled and four automatically; the total tonnage being 215 tons. The plaintiffs contended that the proper system to be followed in adjusting the prices to be paid for these lots is to deduct the amount paid by the Smelter Company from the average values on all shipments made during the month of May, that is to say, $15.05 per ton. The Chief Justice thought it fairer to confine the average to the ten lots crushed automatically immediately before and immediately after the lots in question. The amount payable by the plaintiffs to the defendants would be, under the plaintiffs' contention,

$2,825.38, according to the system approved by the Chief Justice, $2,601. But in selecting his method the learned Chief Justice had not accepted as a fact that lot 295 had been proved, by automatic sampling, to be only of the value of $9.65 per ton. I think that any method of striking an average of value in which that drop in value is not considered, would be misleading. I have come to the conclusion that by adding the values of say two undisputed lots immediately before and after lot 295 to the known value of that lot, and dividing by five, would not be an unfair estimate of the probable value of the ore in lots 296 and 297.

Taking that average, which is $8.75, the account would stand thus:

Lot 296—226.155 tons at $8.75	$1,978.85	
Less paid on account	266.86	
		$1,711.99
Lot 297—215.574 tons at $8.75	$1,886.27	
Less paid on account	905.41	
		980.86
Total amount due to adjust		$2,692.85

This I see turns out more advantageous to the plaintiffs than the method adopted by the Chief Justice, but nevertheless, I think the method is as fair a system as can be devised. The defendants cannot complain, for in my opinion, the rule laid down in *Armory* v. *Delamirie* (1821), 1 Str. 505; *Clunnes* v. *Pezzey* (1807), 1 Camp. 8; and *Hammersmith, etc., Railway Co.* v. *Brand* (1869), L. R. 4 H. L. 171 at p. 224, is applicable to this case.

I think the judgment should be reduced as I have indicated to $2,692.85, but for the sake of uniformity I shall say $2,550.98. As the defendants have been successful to a certain extent, I think there should be no costs of this appeal to either side.

Appeal dismissed.

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ATTORNEY-GENERAL v. WELLINGTON COLLIERY CO.

(10 B. C. 397.)

Coal Mines Regulation Act—Rule Prohibiting Employment of Chinamen Below Ground—Colliery Company Infringing Rule—Injunction to Restrain—Practice.

Held, on a motion by the Attorney-General for an injunction to restrain a colliery company from employing Chinamen below ground in contravention of r. 34, section 82 of the Coal Mines Reg. Act, that the matter was not one affecting the public, or likely to affect it to such an extent as to call for the granting thereof.

Statement.

MOTION for an injunction to restrain the defendant company from employing Chinamen below ground at their mines at Union.

By the Coal Mines Regulation Act Further Amendment Act, 1903 (ch. 17, sec. 2), rule 34 of sec. 82 of ch. 138 R. S. B. C. was repealed, and the following substituted therefor:

"No Chinaman or person unable to speak English shall be appointed to or shall occupy any position of trust or responsibility in or about a mine subject to this Act, whereby through his ignorance, carelessness or negligence he might endanger the life or limb of any person employed in or about a mine, viz.: As banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer, or be employed below ground or at the windlass of a sinking-pit."

On the return of the motion the affidavit of Thomas Morgan, Inspector of Coal Mines, was read, in which he deposed as follows:

(1) and (2) That he had been inspector since 1898, and that one of his duties was to investigate all mine accidents on Vancouver Island.

"(3) At the time I received the above mentioned appointment I had had twenty-nine years experience as a miner in the coal mines at Nanaimo, in this Province.

"(4) The defendant company at the present time is operating three coal mines at Union aforesaid, known respectively as No. 4 Slope, No. 5 Shaft and No. 6 Shaft.

"(5) The defendant company at the present time employs below ground in No. 4 Slope, 95 white men and 92 Chinamen; in No. 5 Shaft, 36 white men and 86 Chinamen; in No. 6 Shaft, 6 white men and 43 Chinamen.

"(6) The defendant company always employ below ground in No. 6 Shaft more Chinamen than white men.

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"(7) On 15th July, 1903, an explosion occurred in No 6 Shaft, resulting in the death of 16 Chinamen; the cause of the explosion he was unable to determine, but he was inclined to think it must be attributed to the negligence or ignorance of the Chinese miners.

"(8) On 17th April, 1879, an explosion of gas occurred in the Wellington Colliery, by which 7 white men and 4 Chinamen lost their lives. An inquest was held upon the bodies recovered, and the verdict of the coroner's jury was that the explosion was caused by a Chinaman passing towards the face of No. 10 level. If the accident was caused in this way, in my opinion, it was due to the gross ignorance or carelessness of the said Chinaman.

"(9) My experience gained as inspector and miner has led me to the firm conviction that the employment of Chinese below ground in coal mines endangers in a high degree the lives and limbs of the other miners employed in such mines. While many Chinese miners can speak some English, one never can be sure that, at the time of danger, they will clearly understand orders given to them, which need to be exactly carried out in order to avert a catastrophe.

"(10) My experience also is that Chinese miners, as a class, stubbornly adhere to their own ways of working in coal mines notwithstanding all efforts to convince them of their danger, of which I will give same samples:"

(*a*) In 1897, a Chinaman was killed in No. 4 Slope by the cars, he persisting in walking between the rails.

(*b*) In 1902, a Chinaman was killed in No. 5 Shaft by stupidly knocking away a post supporting a rock overhead.

(*c*) In 1900, while a white fireman in No. 6 Shaft was putting up some brattice which had been knocked down by a shot in a stall, a Chinaman, through ignorance or carelessness, took his light to the return side of the brattice where gas had accumulated, the result being an explosion, by which both fireman and Chinaman were burned.

(*d*) In 1902, in No. 5 Shaft, a Chinaman although warned not to use a naked light in a certain place, did so, with the result that he was so badly burned that he died.

(11) and (12) After the passing of the Act he notified (on 18th July) the company to cease employing Chinamen below ground, but notwithstanding his notice the company persisted in so employing them.

(13) On an information laid by him against the company's manager, charging him with employing Chinamen below ground contrary to the Act, the manager was convicted and fined, but notwithstanding said conviction the company persists in employing in its mines the number of Chinamen mentioned in paragraph 5.

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"(14) In my opinion, based upon my experience as inspector and miner, unless the defendant company is restrained from employing Chinamen below ground in said mines, there is imminent danger of accidents occurring which may cause the loss of many lives."

Argument.

The motion was argued at Victoria on the 16th of September, 1903, before IRVING, J.

A. E. McPhillips, Attorney-General (*D. M. Rogers*, with him), in support of the motion: The rule is intended for the protection of life and enacts that a Chinaman *per se*, should not be employed below ground in coal mines; the Legislature—and it is the paramount authority in this case—has undertaken to say that Chinamen are not to be employed below ground palpably for the reason that they are dangerous workmen as such—from their very nationality they are dangerous workmen—and hence any analysis as to whether they are as good miners as white men is not a matter for investigation.

[IRVING, J.:—You have an injunction from the highest Court in the land now standing in the books forbidding these people from employing Chinamen underground. When you have got that, why do you come to this Court for a further injunction?]

Because of the non-respect and non-observance of this defendant company of the law of the land.

[IRVING, J.:—But the highest Court in the land has provided a remedy, and a penalty for refusing to obey their mandate; there may be an indictment, fine and imprisonment.]

But I have a right as Attorney-General to come to this Court and ask the Court to see that the law is observed.

[IRVING, J.:—It is laid down in the case of the *Emperor of Austria* v. *Day* and *Kossuth* (1861), 3 De G. F. & J. 217, that a Court will not grant an injunction to enforce moral obligations, or to prevent people from breaking the criminal law.]

There is no evidence of the infraction of the criminal law here; this is a law passed which is passed within the rights that exist in this Province with regard to property and civil rights. We have passed a certain law or regulation, which we say must be observed; and I submit to your Lordship that when my learned friend's clients are entitled to mine coal in this Province, they are only entitled to do so under the laws of this Province; and if they transcend those laws, transgress them in any respect, I am entitled to come here in the public interest and ask that they should be compelled to live within those laws: see Kerr on Injunctions, 531, and *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501 at p. 506.

[IRVING, J.:—That judgment speaks of protecting a right: does it say what kind of a right?]

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Well, a right of the public; the company employs both white men and Chinamen and the protection to the white men is that no Chinamen shall be employed underground.

[IRVING, J.:—That is not a protection to the public; it is designed for the prevention of accident and the protection of those persons who go down to work there.]

It is a protection for a portion of the public; I am not confined necessarily to the whole of the public: see *Attorney-General* v. *London and North-Western Railway* (1899), 1 Q. B. 72. Surely somebody has a right to protect the miners in such a case as this; they could come here themselves and ask the Court to restrain the company; I come here in equally as strong a position if not stronger.

[IRVING, J.:—I think probably stronger. I do not think any Court in the world would listen to an employee of a company asking for an injunction to restrain the company from working their coal with Chinamen. And the reason of it is just what I have been trying to point out; it is not a public matter. The answer to them would be, if you do not like to incur the risk, you need not go there; you have got no right nor are you compelled to go there.]

Argument.

Take the case of a white miner working under contract, who finds out that in contravention of the Act the company is employing Chinamen, and thus endangering his life; he would have the right to move to restrain the company from carrying on its operations in such a way that he could not safely carry out his contract.

[IRVING, J.:—He never would get an injunction. He would be told at once, if you have any remedy it is in damages.]

But damages would not be the only remedy. These particular mines are situated in the Town of Cumberland, and the effect of an explosion might be to destroy life to a very great extent: See *Bonner* v. *Great Western Railway Co.* (1883), 24 Ch. D. 1 at p. 8; *Mayor, &c., of Liverpool* v. *Chorley Water-Works Co.* (1852), 2 De G. M. & G. 852 at p. 860, and *Ware* v. *Regent's Canal Co.* (1858), 3 De G. & J. 212, in which the Lord Chancellor at p. 228 says, "Where there has been an excess of the powers given by an Act of Parliament, but no injury has been occasioned to any individual, or is imminent and of irreparable consequences, I apprehend that no one but the Attorney-General, on behalf of the public, has a right to apply to this Court to check the exorbitance of the party in the exercise of the powers confided to him by the Legislatures." If a number of persons is endangered, it is an injury to the public. It is not necessary for me to shew any actual injury to the public: see *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.* (1882), 21 Ch. D. 752 at p. 754; *Attorney-General* v. *Oxford, Worcester and Wolverhampton Rail-*

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way Co. (1854), 2 W. R. 330, and *Attorney-General* v. *Cockermouth Local Board* (1874), L. R. 18 Eq. 172, where an injunction was granted to restrain defendants from polluting the water of a river because it was expressly prohibited by Act of Parliament: *Attorney-General* v. *Great Eastern Railway Co.* (1879), 11 Ch. D. 449 and (1880), 5 App. Cas. 443; *Attorney-General* v. *Ely, Haddenham and Sutton Railway Co.* (1869), 4 Chy. App. 194 at p. 199, where Lord Hatherley says, "The question is, whether what has been done has been done in accordance with the law; if not, the Attorney-General strictly represents the whole of the public in saying that the law shall be observed."

[IRVING, J.:—This affidavit of Mr. Morgan does not suggest any danger to the people above ground by the employment of Chinese underground; it does not suggest as you mentioned just now in argument, that this mine is situated in the heart of Cumberland and that an explosion in the mine was likely to cause an eruption which would destroy the whole town. I think you must shew that the public are affected. As long as your affidavit is confined to the question of employing Chinese below, your material is insufficient. I have no doubt if you, as Attorney-General, were to come here and make an application that parties be restrained from blasting in the streets of, say, this city, they could be restrained, because it was likely to cause injury to the public.]

Argument

All I am obliged to shew is that there is a contravention of the law; the company has been seized upon by the general law of the Province as being a public company which must carry on its works according to law; the Court has the inherent power to compel it to stop its illegal acts; if in the labour market there should be employment for white miners who can fulfil the provisions of the law, why should they be deprived of that right? This affects the public.

The right to labour is the highest form and highest class of property.

[IRVING, J.:—I do not think that is a property at all in any sense.]

Where the Legislature says Chinamen shall not be employed below ground surely there is the right in others to object if they are so employed.

The decision of the Judicial Committee in *Cunningham* v. *Tomey Homma* (1903), A. C. 151, is in our favour; if the Legislature can take away from a man the right to vote, surely it can prohibit him from working below ground.

If the company thinks the legislation is *ultra vires* then it is a matter for agitation in the Courts, but the law as it stands must be obeyed. He cited *Stevens* v. *Chown* (1901), 1 Ch. 894; *Attorney-Gen-*

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eral v. *Ashborne Recreation Ground Co.* (1903), 1 Ch. 101, and *Attorney-General* v. *Great Eastern Railway Co.* (1879), 11 Ch. D. 449, and particularly the judgment of Lord Justice James at p. 484 dealing with the question of transgression of statute law.

Luxton, for the company, was not called on to argue.

Judgment.

IRVING, J.:—In the affidavit before me there is no statement as to where this mine is situated, beyond "at Union;" there is nothing to shew, nor is it suggested in the affidavit, that there is any danger to the public by reason of the proximity of the mine to that settlement, or by reason of the mining operations being conducted so close to the surface as to become a nuisance or likely to injure people in the neighbourhood. The case rests simply on this, that a statute prohibiting the employment of Chinese underground is being violated. And there is a suggestion contained in the affidavit that the lives of other people employed underground are endangered.

In granting injunctions, especially where there is a going concern, such as a colliery, the Court has to proceed carefully. It is a very serious matter to interfere with any person's business. There are cases over and over again where the Court has refused to grant an injunction against a colliery on that ground. In that sense, the public are interested in seeing that the thing is carried on. But that does not by any manner of means make the system of carrying on the mine a matter of public concern. Now the Attorney-General contends that the system on which this mine is carried on is a matter of public concern. I am not able to see that it concerns the public in any way whatever. It is not a public question. Certainly it is not a question affecting the public or likely to affect the public to such an extent as to call for the allowance of an injunction—which is a very extraordinary remedy. This Court does not grant an injunction for the purpose of enforcing moral obligations, nor for keeping people without the range of the criminal law. There usually must be some right—a right of property, or some right at any rate —infringed, or likely to be infringed. The miner who is employed in that mine has no right to come here and ask for an injunction, because he has no right of property; he has no proprietary right which is being infringed. The Attorney-General is not entitled to obtain an injunction from this Court, because there is no public right being infringed or likely to be infringed. The public are not concerned in this particular matter. To use the language that is referred to in some of the cases —the affidavit does not shew that the public interests are so damnified as to warrant the issuing of an injunction in this case. The motion will be dismissed.

NOTE.—See *In re The Coal Mines Regulation Act*, *post*, p. 112.

1903.
October 13.

FULL COURT.

HUNTER, C.J.

WOODBURY MINES, LIMITED v. POYNTZ.

(10 B. C. 181.)

Free Miner's Certificate, Expiration of—Special Certificate—Mineral Act, sec. 9 and Min. Act Amendment Act, 1901, sec. 2.

On the expiration of a free miner's certificate any mineral claim of which the holder thereof was the sole owner becomes open to location.

The obtaining of a special certificate under section 2 of the Mineral Act Amendment Act, 1901, does not revive the title if in the meantime the ground has been located as a mineral claim.

Statement. ACTION tried before HUNTER, C.J., at Rossland, on the 13th of October, 1903, in which the plaintiff company adversed the defendant's application for a certificate of improvements to the Sunrise mineral claim. The plaintiff claimed the ground in dispute under two locations known respectively as the Sunset and Mayflower mineral claims. These locations of the plaintiff were valid up to the 31st of May, 1901, upon which date the plaintiff allowed its free miner's certificate to expire without renewal. The defendant's claim was located upon the 8th of July, 1901. On the 25th of October, 1901, the plaintiff, by paying a fee of $300, obtained a special free miner's certificate in accordance with the provisions of sec. 2, ch. 35 of the Statutes of 1901, and relied upon that section as reviving its rights, notwithstanding the intervening location of the defendant. The regularity of the locations, and all other facts, were admitted.

Argument. *MacNeill*, K.C., for plaintiffs.

McAnn, K.C., and *P. E. Wilson*, for defendant.

Judgment. HUNTER, C.J.:—The effect of Mr. MacNeill's contention is that the property was locked up for six months after the lapse of the plaintiffs' certificate. That is not my view at all. The Legislature had no such intention, or it would have said that after the certificate had lapsed, the property should not be open to location until after the six months had elapsed, just as it has provided that in the event of the owner's death his claim should not be locatable within twelve months without the permission of the Gold Commissioner.

Judgment for the defendant with costs.

NOTE.—See *McNaught* v. *VanNorman*, *ante*, p. 7.

SNYDER *et al.* v. RANSOM *et al.*

RANSOM *et al.* v. SNYDER *et al.*

1903.
October 29.

FULL COURT.

(10 B. C. 182.)

Fractional Mineral Claim—Location Line—Re-location by Agent of Original Locator—Permission of Gold Commissioner under secs. 32 and 108 of Mineral Act—Principal and Agent.

Where the holder of a mineral claim which is the subject of an adverse action causes the same ground to be re-located by another free miner from whom he purchases for a small consideration, the provisions of sec. 32 of the Mineral Act, requiring the Gold Commissioner's permission to re-locate, do not apply.

The location line of a fractional mineral claim must be marked in the same manner as that of a full sized claim.

Statement.

THESE were two adverse actions consolidated and tried at Nelson during the October Sittings of the Supreme Court, before IRVING, J.

The defendants Ransom *et al.* advertised, pursuant to the Mineral Act and amendments thereto, for a certificate of improvements to the Bellevue fractional mineral claim, located by Ransom on the 9th of July, 1901, and the plaintiffs Snyder *et al.* brought their action to adverse such application, claiming the same ground under a senior location known as the Parrott mineral claim, located on the 29th September, 1898.

The defendants thereupon caused the same ground to be re-located as the Redress Fractional No. 2, on the 13th of January, 1903, by one Nelson, from whom they the same day purchased it for a small consideration. The plaintiffs had in the meantime advertised for a certificate of improvements for the Parrott mineral claim, and the defendants commenced action to adverse that application. In the latter action the defendants claimed the ground covered by the Parrott under the Bellevue Fraction location, and in the alternative under the Redress Fraction location.

Argument.

Whealler and *Wragge*, for the plaintiffs, Snyder *et al.*, contended that the Bellevue Fraction was invalid, because its location line was not blazed, and that the Redress Fraction was invalid because the owners of the Bellevue had caused the ground to be re-located without the sanction or permission of the Gold Commissioner, as required by sec. 32 of the Mineral Act.

S. S. Taylor, K.C., for the defendants, Ransom *et al.*, contended that because the Bellevue Fraction is a fractional mineral claim,

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IRVING, J.

blazing of the location line is not necessary under either sub-section (*c*) or sub-section (*d*) of section 16 of the Mineral Act as amended in chapter 33 of 1898, and in this particular a fractional mineral claim differs from a full claim. That, in the alternative, the ground could be held by Ransom *et al.* under the Redress Fraction, and that Ransom *et al.* could procure Nelson to locate the same for them, particularly when it is held that the Bellevue Fraction is invalid.

Judgment.

IRVING, J.:—(After referring to the evidence regarding the location of the Parrott and finding on the facts, that that claim was invalid, proceeded:) I find that the Bellevue Fraction located on the 9th of July, 1901, by Ransom, was in all respects a proper location, except no blazing was done. This, I think, was necessary. Although blazing is not mentioned in sub-section (*c*) or (*d*) of section 16 of the Mineral Act as amended in 1898, it is mentioned in the Form T, referred to in that section.

The Redress Fraction No. 2, located on the 13th of January, by Nelson, I find is good in all respects.

With reference to the argument raised by Mr. Whealler against the Redress Fraction No. 2, namely, that there was no permission to relocate it as provided in section 32 of the Act, I do not think that that section deprives the present owners of the Redress Fraction No. 2 of their title, because it was located by Nelson and afterwards transferred to them. In my opinion, a person may escape from the provisions of section 32 in the way these owners have done.

There will be a declaration that the Redress Fraction No. 2 is a valid claim in all respects and that the others are invalid.

The following order was made as to costs: prior to consolidation, no costs to either party, subsequent to consolidation, defendants Ransom *et al.* to be paid two-thirds of their taxed costs.

NOTE.—This decision cannot be wholly reconciled with that of the earlier one in *Granger* v. *Fotheringham*, to which the learned Judge's attention was not directed. There the re-location by another person was upheld because there was no previous binding agreement to convey to the original locator, and agency was not established. But in the present case the agency of Nelson is clear according to the report, and also the re-location was effected during the pendency of the action.

For a list of defects in locations see Vol. i., p. 504, and also *Brit. Lion Gold. Co.* v. *Creamer*, *ante*, p. 51; *Sandberg* v. *Ferguson*, *post*, p. 165; *Docksteader* v. *Clark*, *post*, p. 192; and *Rutherford* v. *Morgan*, *post*, p. 214.

As to re-location by permission of Gold Commissioner: see also sec. 108 of the Mineral Act, and the cases of *Dunlop* v. *Haney* (1899), 1 M. M. C. 369; *Granger* v. *Fotheringham* (1894), 1 M. M. C. 71; and *Pellent* v. *Almoure* (1897), 1 M. M. C. 134.

ROSS v. THOMPSON *et al.*

1903.
November 4.

FULL COURT.

DRAKE, J.

Water Rights—Decision of Gold Commissioner—Appeal from—Evidence on—Practice.

The appeal under section 36 of the Water Clauses Consolidation Act from the decision of the Gold Commissioner is a trial *de novo*.

Statement.

APPEAL to the Full Court from a decision of FORIN, Co.J., on an appeal under section 36 of the Water Clauses Consolidation Act, from a decision of the Gold Commissioner at Fort Steele, in respect to the validity of a water record. The learned County Court Judge held that the appeal must proceed on the evidence before the Gold Commissioner and was not a trial *de novo* and on the material before him dismissed the appeal.

The appeal came on for argument at Vancouver on the 4th of November, 1903, before DRAKE, IRVING and MARTIN, JJ.

Argument.

The only ground of appeal argued by counsel for appellant was that the appeal to the County Court Judge was a trial *de novo*.

S. S. Taylor, K.C., for appellant.

Wilson, K.C., for respondent.

Judgment.

DRAKE, J.:—I think the point taken by Mr. Taylor is a good one. I think when you look at that section 36, although it does not specify how the appeal is to be taken, still what is the good of having a petition, when all the facts may be denied by the respondent when he puts in his answer? How are you to arrive at the truth without you have evidence before you and without evidence is to be taken? You may raise other points than those that came before the Water Commissioner, and on those evidence must be taken. I think the learned County Court Judge should not try these matters except in the ordinary way. My opinion is that, looking at the whole of that section, there must be evidence to satisfy him that the grounds of appeal are substantial and well taken.

[*Wilson*:—Do I understand your Lordship to say that the trial before the County Court Judge should be by parol evidence?]

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FULL COURT.

DRAKE, J.

The appeal comes up by petition and affidavit; these state the facts, and then an answer is put in which may be a bare denial of the facts stated in the petition, or of some of the facts. As soon as that is answered, how are you to arrive at which is correct without evidence is taken in the most convenient way, *i.e., viva voce;* but whether the County Court Judge takes evidence by affidavit or not, he will have to satisfy himself as to the correctness of the decision of the Water Commissioner.

IRVING, J.

IRVING, J.:—I think this must go back. When you compare the provisions of section 36 of the Water Clauses Act with the appeal given by section 95 of the Crown Lands Act, you find in the latter Act that the appeal is confined to questions of law only. I think, therefore, the Water Clauses Act does not limit the appeal to questions of law, but allows an appeal upon questions of law and fact. The whole matter ought to be taken *de novo.* I think the proper way to proceed is to take oral evidence, but I think it would be quite proper if affidavits were accepted, if the parties wish it.

MARTIN, J.

MARTIN, J.:—I concur with what my learned brothers have said. I only point out, after reading section 39, that section 36, when it says a straight appeal, means a straight appeal; there is nothing said about "petition" when it speaks of an appeal. I think the statute is perfectly simple and clear.

Appeal allowed, with costs.

NOTE.—For other cases under this Act, see *In re Water Clauses Consolidation Act, Centre Star Mining Co.* v. *City of Rossland, ante,* p. 27; *Re W. C. Act and Rossland Power Co., Ltd., post,* p. 135; *Byron N. White Co.* v. *Sandon W. W. Co., post,* p. 240, and *Brown* v. *Spruce Creek Power Co., Ltd., post,* p. 258.

HASTINGS v. LE ROI NO. 2, LTD.

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(34 S. C. 177; 10 B. C. 9.)

SUPREME COURT OF CANADA.*

Master and Servant—Mine-owner and Miner—Contract for Particular Mining Operation—Negligence—Common Employment—Independent Contractor—Control of Workmen—Statutory Obligation—Metalliferous Mines Inspection Act.

H. & M. contracted to sink a winze in defendant's mine at a certain price per foot, and by the terms of the contract the direction and dip of the winze were to be as given by the defendant company's engineers; the defendant was to provide all necessary appliances, etc.; H. & M.'s workmen were to be subject to the approval and direction of the defendant's superintendent, and any men employed without the consent and approval of or unsatisfactory to such superintendent would be dismissed on request.

A hoisting bucket hung on a clevis was supplied to H. & M. by defendant, and through the negligence of the defendant's superintendent, master mechanic, or shift boss, a hook substituted by defendant for the clevis, at the request of H. & M., got out of repair, in consequence of which the bucket slipped off and in falling injured the plaintiff, who was one of H. & M.'s workmen engaged in sinking the winze.

Held, the plaintiff being subject to the control of the defendant was acting as its servant and the doctrine of common employment applied, and consequently the action was not maintainable. The question of control is the decisive test in such a case.

Decision of the Full Court of British Columbia affirmed; TASCHEREAU, C.J., dissenting.

Statement.

APPEAL by plaintiff from a decision of the Full Court of British Columbia reversing the judgment of Mr. Justice IRVING in favour of the defendant company.

This was an action at common law for damages for personal injuries sustained by the plaintiff while working as a miner in the Josie mine, owned by defendant. The plaintiff while working for Hand & Moriarity, who were under contract with the defendants to sink a winze in the Josie mine from the 700 foot level, was injured by the fall of an iron bucket used for hoisting waste rock.

The defendants and Hand & Moriarity had entered into a written contract for the sinking of the winze; by the contract the direction and dip were to be as given by the defendant's engineers; the defendant was to provide the contractors with all necessary appliances, explosives, etc.; all the men employed in carrying out the contract should be subject to the approval and direction of the defendant's

* *Present*:—Sir Elzear TASCHEREAU, C.J., and SEDGEWICK, DAVIES, NESBITT and KILLAM, JJ.

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superintendent, and any men employed without his consent and approval or unsatisfactory to him would be dismissed on request. The superintendent also had control of the increase or decrease in the scale of pay and hours of labour where there was any change from the regulation and lawful number of hours for underground miners.

The defendant supplied the contractors with the bucket hung on a clevis, but at the request of the contractors the clevis was changed for a hook, and subsequently, on account of a broken catch, the bucket slipped off the hook and fell and struck plaintiff injuring him, and in respect of which injury the present action was brought.

It was through the negligence of the defendant's superintendent, their shift boss or their master mechanic that the hook was allowed to get out of repair, or to be used after it got out of repair.

The trial took place in Rossland on 24th February, 1903, before IRVING, J., and a jury. The defendants set up the defence of common employment, and moved for a non-suit, which was refused, the Judge holding that the circumstances were not such as to entitle defendant to set up that defence.

The Judge put no questions to the jury; in his charge he told them that if they found that the defendants took reasonable precautions for the protection of plaintiff to find for them, but if they found that they didn't then to find for the plaintiff and assess the damages.

The jury returned the following verdict:

"We, the undersigned jurors, empanelled on the case of *Hastings* v. *Le Roi No.* 2, in which it is attempted to shew that the said defendant company did not take the proper precautions to safeguard the lives of the workmen engaged in sinking the winze on the seven hundred foot level of said company's property, hereby find that the plaintiff is entitled to damages to the extent of $3,400.

"We wish to add that in giving a verdict for the plaintiff we do not wish to impute perjury to any of the witnesses who said they did not see any defect in the hook and appliances from the fact that the hook and appliances constantly get covered with mud and muck, and so render it impossible to notice any such defect."

His Lordship ordered judgment to be entered in plaintiff's favour for the amount so found.

Appeal to FULL COURT.

The plaintiff appealed, and the appeal was argued at Vancouver on the 8th of April, 1903, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Argument.

Davis, K.C. (*Clute*, with him), for appellants: The agreement shews that the plaintiff was in the employ of the defendant, who controlled the manner in which the work was to be done; a servant is in the employ of the person under whose control he is; control is the

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test: see *Wiggett* v. *Fox* (1856), 25 L. J., Ex. 188; *Abraham* v. *Reynolds* (1860), 5 H. & N. 143; *Rourke* v. *White Moss Colliery Co.* (1877), 2 C. P. D. 205, and *Johnson* v. *Lindsay & Co.* (1891), A. C. 371.

In the alternative, if Hand & Moriarity were independent contractors the plaintiff has no case against defendants.

MacNeill, K.C., for respondent: If Hand & Moriarity were independent contractors, *Indermaur* v. *Dames* (1867), L. R. 2 C. P. 311, shews that the defendants would be liable.

Directions were given by defendants' superintendent to Hand, who directed his own men; the plaintiff was not the defendants' servant; he was engaged by Hand, who would have had to discharge him on defendants' request. He cited *Smith* v. *London & Saint Katharine Docks Co.* (1868), L. R. 3 C. P. 326; *Miller* v. *Hancock* (1893), 2 Q. B. 177; *Marney* v. *Scott* (1899), 1 Q. B. 986; *Cameron* v. *Nystrom* (1893), A. C. 308; *Union Steamship Co.* v. *Claridge* (1894), A. C. 185; Beven on Negligence, 816-23; *Wiggett* v. *Fox* is overruled by *Johnson* v. *Lindsay & Co.*, *supra*.

Even assuming the defence of common employment otherwise open, the defendants would be liable because they did not supply good materials.

Davis, in reply.

Cur. adv. vult.

16th June, 1903.

Judgment below, HUNTER, C.J.

HUNTER, C.J.:—I think the appeal must be allowed. The authorities shew that the decisive test of whether or not the relation of fellow servants exists is furnished by the inquiry as to who has the control and direction of the negligent and injured persons; see especially the judgment of Mellish, L.J., in *Rourke* v. *White Moss Colliery Co.* (1877), 2 C. P. D. 205 at p. 209, and of Bowen, L.J., in *Donovan* v. *Laing Syndicate* (1893), 1 Q. B. 629 at p. 634.

In this case it is clear from the contract that the defendants had the control and direction of both, and therefore the defence of injury by the negligence of a fellow servant is open to the company.

I may add that the case considerably resembles that of *Griffiths* v *Gidlow* (1858), 3 H. & N. 648, except that here the plaintiff denies that he knew the defective condition of the hook, which, notwithstanding the suggestion thrown out by the jury, seems remarkable, as, even if he did not actually work with the tackle himself, he was for two or three days before the accident in the winze in which it was being used.

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DRAKE, J.:—The plaintiff in this action by his statement of claim set up a case under the Employers' Liability Act, and also at common law; but at the trial of the case proceeded under the common law only. The appellants' counsel, Mr. Davis, confined his argument to one point only, viz.: That the respondent was in fact a fellow servant of the appellants' employees, and as such not entitled to recover.

The facts undisputed are that J. Hand and J. Moriarity were contractors under the company for certain mining operations to be carried on in the Le Roi No. 2, and, as such contractors, entered into a written contract with the respondent for the respondent's service. The appellants were to find the contractors with all necessary appliances, steam-power, etc., for the work to be done. The terms of the contract set out that all the men employed by the contractor should be subject to the approval and direction of the superintendent of the company; and any men employed without the consent and approval of or satisfactory to the superintendent should be dismissed on request. The superintendent also had control of the increase or decrease in the scale of pay and hours of labour where there was any change from the regulation and lawful number of hours for underground miners. The question here is a simple one. Does this contract give such a control over the men employed by the company as to constitute them the workmen of the company? The engagement, it is to be noted, is subject to the approval of the company, and the men employed are subject to the direction of the superintendent of the company, and are liable to be dismissed at his request. I think this, taken in connection with the evidence of Kenty, the foreman of the mine, who gave instructions how the work was to be done, and these instructions were conveyed to the plaintiff by Hand, shews that there was such a control exercised over the men working under the contract as made the contractors' employees completely subject to the orders of the company. The defendants rely on the case of *Wiggett* v. *Fox* (1856), 11 Ex. 832. In that case the defendants employed to do some building made a sub-contract to do piece work, the material and tools being found by the defendants. The sub-contractor employed the plaintiff, who was killed by an accident caused by one of the defendant's men. It was held the sub-contractor and his workmen were engaged in one common employment, and consequently the defendants were not liable for the acts of a fellow servant. The case was discussed in *Johnson* v. *Lindsay & Co.* (1891), A C. 371 at p. 379. Lord Herschell says: "If the law there laid down, *i.e.*, *Wiggett* v. *Fox*, would determine the present case, I should feel bound to reject it as inconsistent with other English authorities." And Lord Watson is more emphatic; he says at p. 383, that "if it must be taken to establish

Judgment below, DRAKE, J.

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the proposition maintained by the respondents, I could have no hesitation in holding that it was not decided according to law;" and he goes on to point out that Baron Channell subsequently explained that he assented to the judgment because he thought Fox had control over Wiggett; in other words, the relation of master and servant actually existed between Wiggett and Fox & Co.

In my opinion there must be shewn to be not only common employment, but a common master. Here there was a common employment and a common master. The fact that the defendants' foreman had the right of selection, approval and direction of the workmen, and the right to tell the contractor to dismiss, he became in fact the plaintiff's master. The plaintiff's engagement being subject to the defendant's approval alone did not make him the servant of the defendants, neither did the right to suggest his dismissal. But he was to be subject to the direction of the defendants. The rule with respect to common employment is laid down by Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. H. L. 266, that when several workmen engage to serve a master in common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness against which their employer cannot secure them; and they must be supposed to contract with reference to such risks; and in *Swainson* v. *North-Eastern Railway Co.* (1878), 3 Ex. D. 341, at p. 349, Brett, L.J., says, "in order to give rise to the exemption there must be a common employment and a common master; there need not be a common servant or fixed wages." Thus the point in issue is in fact limited to the construction of the plaintiff's contract. Under that he was subject to the approval and direction of the superintendent of the defendant company. If it was only a question of approval, the exemption would not apply, but when he is subject to the direction of the defendants he becomes at once a servant who is bound to obey the orders of the superintendent. I think the question of common employment arises in this case, and being so, I think the defendants are not liable. The appeal will be allowed with costs.

Judgment below, DRAKE, J.

MARTIN, J.:—This is a common law action for negligence, and the circumstances are such that if the defendant company is entitled to set up the defence of common employment then the plaintiff cannot recover. The facts of the case resemble those in *Dynen* v. *Leach* (1857), 26 L. J., Ex. 221, and *Griffiths* v. *Gidlow* (1858), 3 H. & N. 648. See also *Clarke* v. *Holmes* (1862), 7 H. & N. 937, 943; and *Murphy* v. *Phillips* (1876), 35 L. T. N. S. 477.

MARTIN, J.

It is contended by the plaintiff that his original employers stood and continue to stand in the relation of independent contractors to the defendant company under the written contract in question, and

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that he was employed by them alone, while the company submits that by the true construction of that contract the relationship of master and servant was, so far as liability for the negligence now complained of is concerned, established between it and the plaintiff.

The case of *Wiggett* v. *Fox* (1856), 11 Ex. 832; 25 L. J., Ex. 188, is largely relied upon by the defendant, and, though to a certain extent the effect of that decision has been curtailed by *Abraham* v. *Reynolds* (1860), 5 H. & N. 143; *Rourke* v. *White Moss Colliery Co.* (1876), 1 C. P. D. 556; (1877), 2 C. P. D. 205; and *Johnson* v. *Lindsay & Co.* (1891), A. C. 371, nevertheless, in so far at least as the question of control by a common master is concerned, it is, as explained by Baron Channell in *Abraham* v. *Reynolds*, still an authority in favour of the plaintiff.

In the determination of the question of the existence of the relationship of master and servant in such cases as the present, there are four principal elements which may or may not require consideration according to the circumstances of each case; (1) the selection or engagement of the workman; (2) his payment; (3) his discharge; (4) the control and direction of his work or labour. A perusal of the authorities makes it clear that the last is the essential one, and that even if the workman's original employer retains in himself the first, second and third, yet parts with the last, that of itself establishes for the purposes of cases of this class the relationship of master and servant between the workman and the third party in whose favour such original employer relinquished that right of control.

Judgment below, MARTIN, J.

This question of control is generally one of fact to be determined by the jury according to the circumstances of each case: *Masters* v. *Jones & Co.* (1894), 10 T. L. R. 403; *Cahalane* v. *North Metropolitan Railway and Canal Co.* (1896), 12 T. L. R. 611, and as is pointed out in Ruegg on Employers' Liability (4th Ed.) p. 18, "the difficulty is only as to the right inference to be drawn from the facts, not as to the principle upon which the liability depends." Here, fortunately, there is a written contract the construction of which will enable this Court to arrive at the necessary conclusion without the assistance of the jury.

Of all the cases which I have consulted, the decision of the Court of Appeal in *Donovan* v. *Laing Syndicate* (1893), 1 Q. B. 629, most closely resembles the case at bar, and establishes the principle above enunciated. Lord Justice Bowen, after stating that "the law on the matter now before us seems to me to be perfectly clear," goes on to say that "by the employer is meant the person who has a right at the moment to control the doing of the act. That was the test laid down by Crompton, J., nearly forty years ago, in *Sadler* v. *Henlock* (1855), 4 E. & B. 570, in the form of the question: "Did the defendants

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retain the power of controlling the work? . . . There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and, the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another—that is, he may lend them—and in that case he does not retain control over the work."

In the case at bar, the contractors not only placed their workmen but themselves under the direction and control of the defendant company, which alone would be sufficient, but, in addition, they also subordinated even their right of selection of their workmen to the will of the company, and further undertook to discharge them upon its bare request without cause assigned.

I may add that the importance of this question of parting with control was recognized by Lord Chief Justice Russell in *Jones* v. *Scullard* (1898), 2 Q. B. 565 at p. 569, wherein *Rourke* v. *White Moss Colliery Co.* and *Donovan* v. *Laing Syndicate*, were considered and applied.

The result is that the appeal should be allowed with costs.

Appeal allowed with costs.

Appeal to S.C.

The plaintiff appealed to the Supreme Court of Canada, and the argument was heard on October 26th and 27th, 1903.

Argument.

Shepley, K.C., for the appellant. The question of common employment is purely one of fact to be decided by the jury. The jury by their general verdict having found this issue with all others against the defendants, and there being evidence on which the jury could have so found, the verdict is final and this Court should not interfere: *St. John Gas Light Co.* v. *Hatfield* (1894), 23 S. C. R. 164; *Masters* v. *Jones* (1894), 10 T. L. R. 403; *Cahalane* v. *North Metropolitan Railway Co.* (1896), 12 T. L. R. 611. There is no ground for the defence of common employment as this is not an action on the written contract or between the parties to it, and it was open to the plaintiff to shew that this writing was not the real contract and to shew by other evidence what was the relationship between the parties. The Judges in the Full Court looked only at the terms of the written contract to determine whether the plaintiff was in common employment with those whose negligence caused the injury. The appellants submit that the whole of the evidence must be considered. And, on the evidence, the case of *Johnson* v. *Lindsay* (1891), A. C. 371 applies. The Court should look at all the circumstances and the real agreement: *Waldock* v. *Winfield* (1901), 2 K. B. 596, at page 602.

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In cases cited in the judgments below the question of "control" over the injured and injuring party is considered the material question. It is submitted that "direction" in this contract is not the same as "control." If the defendants could "control" the work of the plaintiff then they could put him to work in any part of their mine or could make him work fast or slowly as they pleased, and that without any reference to the contractors. Anything short of that would not be control at all, and it can hardly be suggested that the defendants possessed such rights. If the men employed by the contractors were really the servants of the defendants, then the contractors had no servants at all, and as the contract was purely to perform manual labour by themselves or their servants, it really meant nothing; there was in effect no contract at all. The case of the defendants must go this length; that the contractors would not have been liable but that the defendants would have been liable to any person injured by the negligence of one of the contractors' men. *Cameron* v. *Nystrom* (1893), A. C. 308; *Abraham* v. *Reynolds* (1860), 5 H. & N. 143. So far as the power to dismiss, assuming it to exist in this case, is concerned, it is of no effect. *Reedie* v. *London & North Western Railway Co.* (1849), 4 Ex. 244. The payment of wages, that must surely mean payment under a legal liability to pay. The plaintiff could only look to the contractors for his wages. Payments charged to the contractors would not be payments by the defendants: *Laugher* v. *Pointer* (1826), 5 B. & C. 547, at page 558; *Quarman* v. *Burnett* (1840), 6 M. & W. 499; *Union Steamship Co.* v. *Clardge* (1894), A. C. 185; *Jones* v. *Corporation of Liverpool* (1885), 14 Q. B. D. 890; *Warburton* v. *Great Western Railway Co.* (1866), L. R. 2 Ex. 30.

Argument.

Assuming that the plaintiff was in fact the servant of the defendants they are still liable in this action under the pleadings, evidence and finding of the jury. *Smith* v. *Baker* (1891), A. C. 325, at page 362, per Herschell, L.J.; *Grant* v. *Acadia Coal Co.* (1902), 32 S. C. R. 427; *Murphy* v. *Philips* (1876), 35 L. T. N. S. 477; *Clarke* v. *Holmes* (1862), 7 H. & N. 937, per Cockburn, C.J.; *Williams* v. *Birmingham Battery and Metal Co.* (1899), 2 Q. B. 338; *Sault St. Marie Pulp and Paper Co.* v. *Myers* (1902), 33 S. C. R. 23; *Paterson* v. *Wallace & Co.* (1854), 1 Macq. 748; *McKelvey* v. *Le Roi Mining Co.* (1902), 32 S. C. R. 664.

The defendants are also liable by virtue of the Metalliferous Mines Inspection Act, R. S. B. C., c. 134, s. 25, rule 11. The direction to report and record the report applies to the daily as well as to the weekly examination. *Scott* v. *Bould* (1895), 1 Q. B. 9. The provisions of this law were not complied with. If such an inspection had been made the defect in the hook would have been detected. The

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hoist would at once have been stopped, and all danger avoided. For the breach of this statutory duty imposed on the defendants, and the injury resulting to the plaintiff therefrom, *prima facie*, the plaintiff has a good cause of action: *Groves* v. *Lord Wimbourne* (1898), 2 Q. B. 402, at p. 407; *Baddeley* v. *Earl Granville* (1887), 19 Q. B. D. 423; *Kelly* v. *Glebe Sugar Refining Co.* (1893), 20 Rettie 833; *Blamires* v. *Lancashire & Yorkshire Railway Co.* (1873), L. R. 8 Ex. 283. The defence of common employment does not apply to an action arising out of a breach of a statutory duty.

Davis, K.C., for the respondents: The sole question in issue is whether or not the defence of common employment is open to the defendants. If the plaintiff was a servant of the defendants, so far as the circumstances connected with and surrounding the accident are concerned, then the defendants are not liable. Whether or not one man is the servant of another is a question of fact to be decided either by the jury upon disputed facts, or by the Judge upon facts which are admitted. Here the facts in that connection are all admitted. The wages of plaintiff and other workmen under the contractors were, by arrangement, paid by the defendants and charged to the contractors. The principal test, however, as to whether or not one man is the servant of another, is whether or not the former is controlled by the latter. One of the results which in law follows the relationship of master and servant is that the master is responsible for the acts of the servant, and it would clearly be unreasonable that a man should be responsible for acts which he himself cannot control, and on the other hand it is clearly most reasonable that a man should be responsible for those acts of others which he does control. Here, the terms of the contract, taken with the evidence, shew clearly that the actions of the plaintiff were subject to the control of the defendants, and, therefore, he was their servant, and a fellow-servant with whichever one of the defendants' servants was responsible for the accident. If the plaintiff, himself, had been guilty of negligence in connection with his proper work, which resulted in injury to another workman in the mine, or to a stranger, the defendants could not have escaped liability on the ground that he was not their servant, and, therefore, that they were not responsible for his negligence.

Argument.

The following authorities were referred to: *Wigget* v. *Fox* (1856), 25 L. J. Ex. 188; *Abraham* v. *Reynolds* (1860), 5 H. & N. 143, at pp. 149, 150; *Johnson* v. *Lindsay* (1891), A. C. 371, at pp. 379, 381, 382; *Donovan* v. *Laing W. & D. Syndicate* (1893), 1 Q. B. 629; *Jones* v. *Scullard* (1898), 2 Q. B. 565; *Masters* v. *Jones* (1894), 10 T. L. R. 403; *Cahalane* v. *North Metropolitan Railway Co* (1896), 12 T. L. R. 611; *Griffiths* v. *Gidlow* (1858), 3 H. & N. 648; *Dynen*

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v. *Leach* (1857), 26 L. J. Ex. 221; *Murphy* v. *Phillips* (1876), 35 L. T. N. S. 477; *Clarke* v. *Holmes*, *supra*, at page 943; *Bartonshill Coal Co.* v. *Reed*, *supra*; *Wilson* v. *Merry*, *supra*.

Cur. adv. vult.

30th November, 1903.

Judgment.

THE CHIEF JUSTICE (dissenting).—I would allow this appeal.

I am of opinion that the trial Judge was right in ruling that the appellant was not a servant of the company, respondent.

He was clearly engaged by Hand & Moriarity, the contractors. They alone were his masters. Against them alone was his recourse for his wages; he was paid by them through the company, acting for them and in their name for that purpose. There was nothing in their contract with the company of a nature to bind the appellant that prevents them from making any agreement with him about increasing or decreasing his wages; they alone could dismiss him; the very fact that by the contract with Hand & Moriarity the company could request his dismissal shews that he was not the company's servant, since they could not themselves dismiss him.

The learned Judges of the Full Court seem to have been under the impression that the appellant was under the control of the company and its officers. But that is not so as I view the evidence. He received no orders directly from the officers of the company, for the good reason that the contractors, not the company, were his masters. It is not because the engineers and superintendent of the company had as between themselves by their contract with Hand & Moriarity the direction of the works to be done that the appellant was himself under the control of the company. He is not proved to ever have known of the terms of that contract, nor that there was such a contract in writing at all. He never knew that any one could ever pretend that he was not under the exclusive control of his masters, the contractors; he never received orders but from them; he never submitted himself to the control of any one else. They, not the company, directly controlled him. "He was working for the contractors and not for the company" says Kenty, the company's own foreman.

Assuming, however, that there was a common master and a common employment as regards the appellant and the company's foreman or other employee whose fault might be said to have been the cause of the accident, that would not put an end to the appellant's claim.

The accident in question was caused by a defect in one of the permanent appliances for the working of this mine. A clevis had originally been provided by the company for the purpose of raising

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the bucket at the point in question; that was a safe appliance, but later on, eight or ten days before this accident, the contractor, Hand, replaced this clevis with a hook, having a safety spring, supplied at his request by the company, thereby substituting an unsafe appliance for a safe one. Now it is incontrovertible law that the master is bound to provide for his employee proper and reasonably safe appliances and to keep them in a reasonably safe condition, so that the work be carried on without subjecting the employee to unnecessary risks. And if the master instead of discharging this duty himself, as a corporation must do, imposes it upon one of his employees, the negligence of this employee is, in that respect, the negligence of the master. The master's breach of such duty towards his servant cannot be absolved by the negligence of any one else. The doctrine of non-liability of the master on the ground of common employment has therefore no application in this case.

It is, moreover, in evidence that before the accident the defect in question had been brought to the knowledge of the officers of the company. The evidence is contradictory as to this, but the jury have given credit to the appellant's witnesses. It is in evidence that immediately after the accident, Kenty, the company's foreman, said to Hand, the contractor, "I told you that the hook was dangerous; you had no business to have it on there." Then, Miller, the hoisting engineer, had told, two weeks before and since, to the master mechanic and to the foreman, that the hook was defective. The trial Judge was clearly justified under the circumstances in telling the jury that if they believed the evidence they had to find for the appellant.

It is also clear that no prior knowledge of this defect in the hook in question can be imputed to the appellant.

At the close of the trial, the learned Judge presiding charged the jury that:

> If you find that the company took reasonable precautions for the protection of the men working in there, then you find for the company, and if you find that they did not, then you find for the plaintiff and assess the damages.

The jury returned their verdict as follows:

> We, the undersigned jurors, impannelled on the case of *Hastings* v. *Le Roi No. 2*, in which it is attempted to shew that the said defendant company did not take the proper precautions to safe-guard the lives of the workmen engaged in sinking the winze on the seven hundred foot level of said company's property. hereby find that the plaintiff is entitled to damages to the extent of $3,400.

That is clearly a finding that the company had not taken the proper precautions to safe-guard the lives of the men working in that mine at the time of this accident. And upon what grounds

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that verdict could be disregarded I entirely fail to see. The case of *McKelvey* v. *Le Roi Mining Co.* (1902), 32 S. C. 664, is precisely in point. There the company's contention was that they were not liable on the ground of common employment, the accident, as they argued, being due to the carelessness of the engineer, a co-worker of the plaintiff. But the Court held that as the master who employs a servant in a work of a dangerous character is bound to take all reasonable precautions for the servant's safety, the finding against the company could not be interfered with, though the carelessness of the engineer had undoubtedly contributed to the accident.

I cannot distinguish this case from the present. Indeed, the evidence against the company in this case is stronger than in that one.

Apart from these considerations I would think that the appellant is entitled to succeed upon clauses 14 and 15 of his statement of claim which read as follows:

14. It was the duty of the defendants to the plaintiff and those working in said winze to have inspected once at least in every twenty-four hours, the state of the head gear, working places, levels, inclines, ropes and other works of the said mine which were in actual use, including the said winze and its ropes, head-gear and appliances; and once, at least, in every week to have inspected the state of the shaft and inclines by which persons ascend or descend, and the guides, timbers and ladder-ways therein, and to make a true report of the result of such examination and have such report recorded in a book to be kept at the mine for that purpose and to have such report signed by the person who made the same, and to remedy any defects found on such examination which were liable to be dangerous to those working in the said winze: but the defendants neglected to observe and perform their said duty as above set forth.

15. If the defendants had made or caused to be made the examinations and inspections in the preceding paragraph hereof and had caused the result of such examination to be recorded as aforesaid, the defective condition of said hook and appliances would have been discovered and remedied, and the injury to the plaintiff would have been prevented.

Now section 25 of the Metalliferous Mines Inspection Act, R. S. B. C. ch. 134, enacts as follows:

11. A competent person or persons who shall be appointed for the purpose shall, once at least, every twenty-four hours examine the state of the external parts of the machinery, and the state of the head-gear, working places, levels, inclines, ropes and other works of the mine which are in actual use, and once at least in every week shall examine the state of the shafts or inclines by which persons ascend or descend, and the guides, timbers and ladder-ways therein, shall make a true report of the result of such examination, and such report shall be recorded in a book to be kept at the mine for the purpose, and shall be signed by the person who made the same.

It appears that these provisions of the statute were not complied with. And, if they had been, the defect in question would have been detected and the accident averted. Now, under the law laid down

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by this Court in *Sault St. Marie Pulp and Paper Co.* v. *Myers* (1902), 33 S. C. 23, the doctrine of common employment cannot, under these circumstances, be invoked successfully by the respondents. They cannot shift their responsibility for the non-performance of any of their statutory duties on the shoulders of any of their employees.

I would allow the appeal with costs and restore the judgment of the trial Judge.

The judgment of the majority of the Court was delivered by

NESBITT J.

NESBITT, J.:—I am of opinion that the judgment of the Full Court of British Columbia should be affirmed. My opinion, after the very able argument of Mr. Shepley, was that the appeal should be allowed, but after examination of the evidence and all the authorities quoted, in addition to some others, I think that the Chief Justice in the Court below has correctly stated the decisive test of whether or not the relation of fellow servant exists, namely, "who has the control and direction of the negligent and injured persons." The evidence in this case shews that in order to work the mine as a non-union mine, the form was gone through of letting a contract for work in this case to two men called Hand and Moriarity, the contract in question being for sinking a winze, Hand and Moriarity, with the men they purported to employ doing the excavating, the defendants owning the hoisting apparatus and operating same through their acknowledged servants, the whole of the men engaged in the operation of excavating and raising and dumping of material being under the directions of one Kenty. A contract in writing existed, the important parts of which are as follows:—

(1) The parties of the second part agree to sink a winze, as aforesaid, to be at least ten feet long by six feet wide in the clear, direction and dip to be as given by engineers of the party of the first part.

(3) The parties of the second part agree to work continuously in eight-hour shifts, and change shifts at the same hour as the men employed by the company: *it is also agreed that all men employed in carrying out this contract shall be subject to the approval and direction of the superintendent of the party of the first part*, and any men employed *without the consent and approval of, or unsatisfactory to the superintendent, shall be dismissed on request.*

(4) The parties of the second part agree to bind themselves under this contract to pay the regulation wages of the mine to all the men under their employ and to work only the regulation and lawful number of hours for underground miners, and where any deviation therefrom is considered absolutely necessary, the consent of the superintendent of the mine shall be first obtained before any *increase or decrease in the scale of pay or hours of employment shall be made.*

It was argued that the word "direction" in the third paragraph was not to be given the meaning that the men were under the orders

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of the superintendent, but I think the reference in clause one shows that the word "direction" as used in that clause indicates that full effect is to be given to the word "direction" in the third clause, and the evidence seems to me to make it very plain that the excavating, raising and dumping of material was all looked upon as the one work. The plaintiff says:—

Q. You say you were employed by Hand. Did you see Kenty in the mine often?—A. Every day I see him.

Q. He directed the way the work was to go on, didn't he?—A. Yes, sir.

Q. Hand and yourself followed the directions he gave?—A. He gave direction to Hand, and Hand directed us. He never told me. I don't remember speaking to him, only as I was going out of the mine.

Q. Hand was in charge of the mine?—A. Yes, sir.

Q. And in your presence Kenty would come down and direct how the work was to go on?

A. Yes, every day.

This, taken with the admitted facts that the man got his pay in an envelope from the company (although the form was gone through of the amount paid him being charged to Hand and Moriarity) with the written contract showing precisely the relations between the superintendent of the mine and all the men, namely, that no man could be employed except by the superintendent's consent; that the rate of wages was fixed by the company; that a man could be discharged at any moment by the superintendent by going through the form of instructing Hand or Moriarity to discharge the man; that he had complete control and direction of the men, could tell them in what part of the work for which they were employed they should work; gave orders to Hand just as any superintendent would give directions to a foreman in a factory which orders were by Hand communicated to the men. It is well known in all works of this character some one is foreman of the gang to whom directions are given, and such foreman transmits the orders to the men. I think that it is perfectly clear that the answer to the inquiry as to the control and direction of the negligent and injured persons must be that the company had such control. All the authorities establish clearly the proposition that A. may employ B. and pay him, and still B. being under the control of C. has a common employment with others engaged in the same work who are under the control of C. and who are directly hired by C. The discussions which have arisen in the cases have always been upon the facts as to the control of the workmen. I think that here the men engaged by Hand and Moriarity in this particular work knew that there was one common controlling mind in those engaged in the work of excavating and raising the material excavated to the surface, and I think clearly, on this evidence, that if a stranger had been injured by some negligent act done by the plaintiff while engaged in his work, that the com-

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pany would have been liable, and I think that the appellant continuing in the employment runs the risks of the organization so controlled by Kenty.

It was also argued that under the statute there was a liability because of the failure to make a daily report of the condition of the machinery. I do not think anything turns upon this for the simple reason that the accident was not in any sense due to the failure to make such examination. The want of a proper hook, according to the evidence, was known to and reported to Burns who should have stayed the hoisting until the defect was remedied, so that the object for which the statute was passed, namely, discovery of the defect, was obtained, and the act of negligence from which the accident arose was Burns' failure to remedy the defect when it was discovered and reported to him.

Appeal must be dismissed.

Appeal dismissed with costs.

NOTE.—For other cases on negligence in mines: see *McKelvey* v. *Le Roi Mining Co.*, *ante*, p. 13; *Gunn* v. *Le Roi Mining Co., Ltd.*, *ante*, p. 53; *Hosking* v. *Le Roi, No. 2, Ltd.*, *post*, p. 100, and *Leadbeater* v. *Crow's Nest Pass Coal Co.*, *post*, p. 145.

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STAR MING. & MILLG. CO. (LTD. LBY.) v. BYRON N. WHITE CO.

FULL COURT.

Practice—Discovery—Extralateral Rights—Apex—Mine Manager or Superintendent—Compelling to Answer Questions on Examination.

In the examination for discovery of a mine superintendent the party examining is entitled to answers as full, direct and explicit as it is in the power of the witness to give.

He who occupies a responsible position in the management of a mine will be presumed to be a person of experience and competence in mining matters, and must testify accordingly in regard to the workings under his superintendence.

It is specially desirable in actions respecting extralateral rights that there should be the fullest possible disclosure.

Statement

SUMMONS to compel Oscar V. White, the superintendent of the defendant company's mine, the Slocan Star, to answer certain questions on his examination for discovery.

The chief questions and answers in dispute and the proceedings thereon before the examiner are as follows:—

Q. Will you shew me on this map—Exhibit O.W.I.—the apex of the vein, as you contend or believe it to be, as to that portion of the vein which is found between the points 55 and 72 (about 100 feet apart) in the No. 5 tunnel?

MR LENNIE: I object to the question on the ground that the witness has already said—

MR. TAYLOR: Then I object to your stating what the witness has said.

Witness here leaves room on account of Mr. Taylor objecting to his remaining.

MR. LENNIE: (continuing)—on the ground that the witness has already said that he is not a mining expert engineer, mineralogist, geologist, and the question of where the apex of the vein is, is one which he is not capable of giving a proper opinion about. We have no objection to the witness offering his own idea as to the general course of the apex, but otherwise he is advised not to answer the question.

Q. Now, what part of that dotted line in your belief is the apex of the vein, which shews in the No. 5 tunnel, between points 72 and 54 (about 360 feet apart)?

MR. LENNIE: I object on the same ground as before, and instruct the witness not to answer.

Q. Well, the apex on the surface would of course shew the vein as you found it in the No. 5 tunnel between points 72 and 95 (about 640 feet apart)—would take about the same general course, would it not?

MR. LENNIE: I object to that question on the same grounds as before, and instruct the witness not to answer.

Q. Have you any reason to believe that it is different—that the general course of the apex is different from the general course of the vein between 72 and 95, as found in the No. 5 tunnel?

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MR. LENNIE: I object on the same ground as before.

Q. You don't pretend, do you, that the vein at 72 to 54 in No. 5 tunnel has an apex in the region of points 74 to 73 (about 480 feet apart)?

MR. LENNIE: I object to that question; it is just another way of putting the question I before objected to. I object on the same ground as before.

Q. Will you state approximately on this map where you claim the apex of the vein as found in the No. 5 tunnel between the points 72 and 54, is?

MR. LENNIE: I have the same objection as before, and upon the same grounds.

The matter was argued on December 2nd, 1903.

Argument.

S. S. Taylor, K.C.:—This witness was in charge of the mine when these operations now complained of were carried on, and he must be presumed to have knowledge of them, and there is no valid reason shown why he should not answer fully.

Lennie:—The questions are aimed at obtaining a conclusion rather than answers on facts—the recent decision in *Hopper* v. *Dunsmuir* (1903), 10 B. C. 23, does not go to the length of requiring conclusions to be stated which are derived from technical details connected as here with the dip, strike and vein itself. This witness has no technical knowledge, and he really gave his answers so far as it was possible for him to do, though in a somewhat different way from that in which the questions were put to him. The examination of Byron White, the president and general manager, who resides in the State of Washington, shews the plaintiff has got all it is entitled to. I wish to refer to it.

Taylor:—I object. That stands by itself and cannot be referred to here to excuse the present witness from answering.

(*Per* CURIAM:—That examination should not be referred to on this application, which must be dealt with on its own basis.)

Taylor, K.C., in reply:—The argument of my learned friend is inconsistent, because on the one hand he contends that the witness could not have answered fully, and on the other hand that the witness has in fact done so. The witness is, and must be presumed to be from the responsible position he occupies, an experienced mining man, though he may not hold the degree or diploma of a chemist, geologist or mineralogist; yet, as he says, he was born in a mine and has "been round mines all his life." The effect to be given his answers simply goes to the weight of testimony. I rely on *Hopper* v. *Dunsmuir*, *supra*. The fact that he was instructed not to answer really shows that he can answer but does not wish to, relying on technical grounds. There was no attempt to pin him down to a few feet of the apex in his answers, but a reasonable approximation in distance was allowed him.

Cur. adv. vult.

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MARTIN, J.
Judgment.

5th December, 1903.

MARTIN, J.:—After a consideration of those portions of the depositions to which counsel have referred me, and also other portions, I am of the opinion that the questions as a whole have not been answered in that full manner contemplated by the practice of this Court as lately expounded in the case of *Hopper* v. *Dunsmuir* (1903), 10 B. C. 23; in fact some of the questions have not been answered at all even in the indirect manner contended for by Mr. Lennie. It is true that as to the first two questions there was, after refusal to answer, some explanatory statement of a more or less evasive character, but the plaintiff is entitled to answers which are as direct and explicit as it is in the power of the witness to give, and I am unable to accept the view put forward by Mr. Lennie that the plaintiff "has really got his answer though in a somewhat different way" to any one of the disputed questions. The main issue is the establishment of the location of the apex of the vein which runs beneath the Heber Fraction and Rabbit Paw mineral claims owned by the plaintiff company, and the defendant company has been mining beneath those claims on the assumption that the apex of the vein is to be found on its own group of adjoining claims known as the Slocan Star group. These underground workings beneath the plaintiff's claims have been undertaken since the appointment of the witness as superintendent of the defendant company in October, 1898, and the president and general manager, Byron White, resides out of the jurisdiction, at Spokane, in the State of Washington.

The objections to the questions seem to be largely based upon the assumption that because the witness is not a mining engineer, metallurgist, assayer, mineralogist, or geologist, he should not be asked questions of a technical mining nature, or required to state conclusions on mining matters derived from facts and technical details regarding the dip, strike, vein, etc. But there are many men of great experience and standing in the mining world who would not put themselves in any one of the classes above enumerated, and when a man is found to occupy the important and responsible position of superintendent of a mine it must be assumed that he occupies it because he is a mining man of experience and competence, and one who can give, either as the result of his own knowledge or information imparted to him by his special scientific advisers (if such there be), a satisfactory account and explanation of the operations which have been conducted under his superintendence. He may be more or less experienced or competent, but that is a question of the weight to be attached to his evidence, and not an excuse for refusing to testify. In the case of the witness under consideration, it may be noted that he says he was born in a mine and has "been round

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mines" all his life—a period of 46 years. It is specially desirable in these extralateral rights cases, which are an exceptionally difficult branch of mining law, that there should be the fullest possible disclosure. I have no doubt that the witness can answer much more satisfactorily than he has done, and he is consequently hereby ordered to attend at his own expense and answer the questions which he refused to answer, and all additional questions properly flowing therefrom, and to pay forthwith after taxation the costs of this application. The refusal to answer not being contumacious, but to test the question, there will be no order for attachment at this stage.

Order accordingly.

NOTE.—For other cases on discovery and inspection: see this same case, *ante*, p. 40.

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HOSKING v. LE ROI NO. 2, LTD

(34 S. C. 244; 9 B. C. 551.)

Master and Servant—Mine-Owner and Miner—Common Employment—Negligence—Employers' Liability Act—Plans and Surveys—Statutory Obligation—Metalliferous Mines Inspection Act—Course of Trial—Waiver.

The Inspection of Metalliferous Mines Act does not impose upon a distant mine-owner the absolute duty of personally seeing that the working plans of the mine are accurate and sufficient, and unless he is actually aware of inaccuracies or imperfections he is not responsible for an accident resulting from the neglect of his proper and competent officials to keep the plans platted up to date according to surveys.

Where an accident occurs in a mine owned by an incorporated company by reason of the negligence of the proper and competent officials to keep the working plans noted up to date, whereby the superintendent was misled and without inquiring if his orders in regard to the plans had been carried out, gave instructions to mine in a certain locality, the company is liable for injury to the workmen so employed.

Such negligence of the superintendent is negligence of a co-employee of the person injured for which the employers are not liable at common law, although they are liable under the British Columbia Employers' Liability Act.

Per TASCHEREAU, C.J.—An employee who has left the service of the common master cannot be regarded as a fellow workman of servants engaged subsequently.

Decision of the Full Court of British Columbia reversed.

Statement.

APPEAL from the judgment of the Full Court of the Supreme Court of British Columbia, affirming the judgment of the trial Judge, MARTIN, J., who, upon the findings of the jury, directed judgment to be entered for the defendant, and dismissed the plaintiff's action with costs.

Action brought by the widow and children of Charles Hosking, a miner, who was killed while working in a shaft of a mine belonging to defendant company, to recover damages for the death of the said miner, the action being framed under the Employers' Liability Act and also at common law.

Hosking when killed was working with three other men at a point about 165 feet below the 700-foot level in what was called the Josie shaft. What was known as the Annie shaft was in another section of the mine, and about 400 feet distant from the Josie shaft and above the 300-foot level. The sinking of the Annie shaft had been discontinued in November, 1900, but shortly before the accident

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* *Present*:—Sir Elzear TASCHEREAU, C.J., and SEDGEWICK, DAVIES, NESBITT and KILLAM, JJ.

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operations on it had been recommenced; it was partly filled with water (about 75 feet of water in a sectional area of about 96 square feet) and an upraise to connect with it was begun from the roof of the 300-foot level. When the upraise had been run about twelve and a half feet above the 300-foot level the water broke through into the Annie shaft, and rushed along the 300-foot level to the Josie shaft and down it on to Hosking and his fellow workmen with the result that Hosking and another were killed.

Since the discontinuing of the work on the Annie shaft in November, 1900, William Thompson had been appointed general manager by the defendants, and amongst the old plans he found a plan of the shaft which had been prepared in the course of their duties by either R. H. Stewart, who was the first engineer of the mine, or by Turnbull, his successor, and both of whom had left the employ of the company before Thompson was appointed manager and before Hosking commenced work. In re-commencing work on the shaft this plan was used, and on account of an inaccuracy in it the accident happened.

The evidence shewed that each of the engineers was competent.

The course of the trial, which took place before MARTIN, J., and a jury at Nelson, was directed towards establishing a case against the defendants at common law. The jury returned the following verdict:

(1) Have the defendants, or their servants, done anything which persons of ordinary care and skill under the circumstances would not have done, or have they or their servants omitted to do anything which persons of ordinary care and skill under the circumstances would have done? Yes.

(2) If yes; what was it? Failure of the defendant company to provide proper and accurate working plans of the Annie shaft shewing the distance between the roof of the 300 foot level and the bottom of the Annie shaft.

(3) Have the defendants or their servants by such act of commission or omission caused injury to the plaintiff? Yes.

(4) If you find in answering the first question that the company or its servants was or were guilty of any act or omission, who was or were the person or persons, if any, who did such act or made such omission? The defendant company.

(5) Damages, if any? Total $5,000, divided as follows: Elizabeth Jane Hosking (widow), $3,000; William John Hosking (son), $1,150; Stanley Hosking (son), $850.

Judgment at trial, MARTIN, J.

On the cross-motions for judgment on these findings His Lordship gave judgment as follows:

In giving judgment on these motions I think it only necessary to say this case has given me not a little difficulty, but as the result of the application of the findings of the jury to the cases cited, I am unable to do otherwise than allow the motion to enter judgment in favour of the defendant company; in so doing I make use of the

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language used by Chief Justice Erle in the somewhat similar case of *Searle* v. *Lindsay* (1861), 31 L.J.C.P. 106 at p. 109: "I can only say that the conclusion of law was forced on me both at the trial and now, for I never remember having had a case which more moved my feelings and made me desire that the plaintiff should have compensation for the injuries he has sustained." There will be judgment in favour of the defendant company.

Appeal to FULL COURT.

The appeal was argued at Victoria on the 27th and 28th of January, 1903, before HUNTER, C.J., WALKEM and IRVING, JJ.

Argument.

S. S. Taylor, K.C., for appellant: The cause of the accident was the wrong information given to Thompson by the company; the plan lacked a vertical projection of the shaft. The company is liable both at common law and under the Employers' Liability Act.

At common law it is liable because it gave Thompson improper data; if it should be held that this inaccurate plan was not the proximate cause, but that Thompson should have caused an examination to be made then the plaintiff's action under the Act is sustained. I cite *Blyth* v. *Birmingham Water Works Co.* (1856), 11 Ex. 784; *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193 at p. 203; *Wood* v. *Canadian Pacific Railway Co.* (1899), 30 S.C.R. 110 at p. 113, and *Crafter* v. *Metropolitan Railway Co.* (1866), L. R. 1 C. P. 300 at p. 305.

The defence of common employment is not open to the company because both Turnbull and Stewart had left before either Thompson or Hosking came: see Eversley, 963-4; Pollock on Torts, 6th ed., 97-99; Lord Cairns' judgment on this point in *Wilson* v. *Merry* (1868), L. R. 1 H. L. (Sc.) 326; 19 L. T. N. S. 30, is not agreed with by the other members of the Court and see *Johnson* v. *Lindsay & Co.* (1891), A. C. 371 at pp. 378, 380, 383, 386, where parts of his judgment are questioned; he cited also Smith's Master and Servant, 382; *Gilbert* v. *Corporation of Trinity House* (1886), 17 Q. B. D. at p. 799; *Warburton* v. *Great Western Railway Co.* (1866), L. R. 2 Ex. 32, 33; *Perkins* v. *Dangerfield* (1884), 51 L. T. N. S. 535, and *Wood* v. *Canadian Pacific Railway Co.* (1899), 6 B. C. 561, where cases are collected. The Court can find any fact it chooses in a case like this where no facts are in dispute.

Davis, K.C., for respondents: The doctrine of common employment is not the law, it is only an example of the law, and the employer is only liable if he does not supply proper machinery, etc., and whether the accident was caused by the negligence of a former servant makes no difference: Lord Cairns' judgment on this point was not questioned in *Johnson* v. *Lindsay & Co., supra.* I cite *Webster* v. *Foley* (1892), 21 S. C. R. 580; *Rajotte* v. *Canadian Pacific Railway Co.* (1889), 5 Man. 365; *Wood* v. *Canadian Pacific*

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Railway Co., supra, and 30 S. C. R. 113 and *Lloyd* v. *Woodland Brothers* (1902), 19 T. L. R. 33.

At the trial counsel for plaintiff confined himself almost entirely to making a case at common law; he never took the position that Thompson was negligent in not making a survey because that would have defeated his common law action; his two positions were inconsistent, so he elected to take that at common law, and he is bound by it; the plaintiff can't get a new trial in order to get an answer on some other point about Thompson being negligent.

If the company did not supply Thompson with proper information it was the negligence of either Turnbull or Stewart, as theirs was the only report that could be looked at, and they occupy the relation of fellow servants with Hosking; see *Rudd* v. *Bell* (1887), 13 Ont. 47; *Matthews* v. *Hamilton Powder Co.* (1887), 14 A. R. 261; *Howells* v. *Landore Steel Co.* (1874), L. R. 10 Q. B. 62 and *Hedley* v. *Pinkney & Sons Steamship Co.* (1894), A. C. 222.

[HUNTER, C.J.:—Assuming Mr. Taylor has put himself in such a position as to be estopped from asking for a new trial, what powers has the Court itself?]

Your Lordship thinks it a hardship on the plaintiff, but "hard cases make bad law." A party must be bound by the position he takes at the trial; the only ground on which this case could be sent back for a new trial would be on the ground that the verdict was perverse, but that can't be argued as it is the one counsel wanted and the Judge was satisfied with it.

Taylor, in reply: The principle in reference to common employment is that the injured person and the one whose negligence caused the injury were in a common service working together at the same time. He cited *Connecticut Mutual Life Insurance Co. of Hertford* v. *Moore* (1881), 6 App. Cas. 644 at p. 653, and *Thurburn* v. *Stewart* (1871), 7 Moo. P. C. N. S. 334.

Judgment below, HUNTER, C.J.

HUNTER, C.J.:—Although disposed to enter judgment in this case in favour of the plaintiff, I do not see any legal ground on which it can be done. So far as the liability of the defendant company is concerned under the Employers' Liability Act, there is no act of negligence found by the jury in respect of which this Act would make the company liable.

The whole course of the trial was directed towards establishing a case against the defendant company at common law, no doubt with a view to larger damages than could be awarded under the Act. But the findings, which it was argued established the liability at common law, do not, when viewed in the light of the evidence, amount to a

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finding that the company was negligent in not providing adequate materials or plant, etc., but rather to a finding that some employee was negligent or inaccurate in his work on the plans. What plans there were, were made either by Stewart or Turnbull, and there is no evidence to shew that either were incompetent, but, on the contrary the evidence shews that both were competent, and it is well settled that at common law the company is not liable for the negligence of a competent employee.

It was suggested rather than argued that we should send the case down for a new trial, although there is no complaint on the score of mis-direction, or non-direction. As to this, a new trial is not granted to try a case in a new way: *Glasier* v. *Rolls* (1889), 42 Ch. D. 436 at p. 459.

Not only so, but, although it was open on the pleadings to prosecute the attack under the Act, counsel plainly elected to develop a case at common law.

The appeal must be dismissed.

Judgment below, WALKEM, J.

WALKEM, J.:—I agree. This case is very similar to *Wood* v. *Canadian Pacific Railway Co.* (1899), 6 B. C. 561, for the notes of the evidence and of the course adopted by the plaintiff's counsel at the trial, and address of counsel for the plaintiff, plainly shew that more reliance was placed upon the liability of the defendant company under its common law phase than under the Employers' Liability Act. In fact, the plaintiff's counsel, in addressing the learned trial Judge, laid particular stress on the plaintiff's common law right to a verdict; and the verdict being for much more than would have been allowed under the Act tends to shew that the jury acted in view of counsel's observations.

IRVING, J.

IRVING, J.:—I agree. I also wish to point out that the questions submitted to the jury were not the questions usually asked in an action under the Employers' Liability Act.

Of those submitted, the first and third are questions usually put in a common law action, as suggested by Brett, M.R., in *Bridges* v. *Directors, &c., of North London Railway Co.* (1873-4), L. R. 7 H. L. 213. The fourth is a "defence," its object is to bring into play the doctrine of common employment.

I accept the dictum of Cairns, L.C., that an employers' exemption from liability for an accident to a servant happening because of the fault of a fellow servant is applicable to a past servant not in the employ of the employer at the time of the accident; because the doctrine of common employment depends not upon the common employment, as one would suppose, but upon the contract entered into by the master with his servant.

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As to the so-called right of the jury to return a general verdict, I think a general verdict would only be proper where the trial Judge has by his charge prepared the way for such a verdict. Whether he will charge the jury with a view to obtaining answers to questions, or for a general verdict, is a matter of discretion for the Judge.

Appeal dismissed.

Appeal to S.C

The plaintiff appealed to the Supreme Court of Canada, and the appeal came on for hearing on October 27-8, 1903.

Argument.

J. Travers Lewis, for the appellants: We cite the statutes of British Columbia, in point, and the decisions in *Wilson* v. *Merry* (1868), L. R. 1 H. L. Sc. 326; *Johnson* v. *Lindsay* (1891), A. C. 371; *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. 266; *Swainson* v. *North Eastern Railway Co.* (1878), 3 Ex. D. 341; *Charles* v. *Taylor* (1868), 3 C. P. D. 492; *Wood* v. *Canadian Pacific Railway Co.* (1899), 30 S. C. 110; *Smith* v. *Baker & Sons* (1891), A. C. 325; *Choate* v. *Ontario Rolling Mill Co.* (1900), 27 Ont. App. R. 155. The plaintiffs submit that the manager and mine superintendent were negligent as to the surveys and in failing to get accurate information before placing men to work in a dangerous situation. A case at common law has been made or, alternatively, under the Employers' Liability Act, and there is evidence to justify a judgment for plaintiffs on the verdict. Again, if a judgment cannot be entered for plaintiffs, a new trial should be ordered for misdirection by the trial Judge and mistrial.

Davis, K.C., for the respondents: There is no liability for the default of the mine officials in respect to the plans. The accident was due to the negligence of the defendants' engineer and to that alone. The British Columbia Employers' Liability Act, sec. 3, only applies to cases where personal injury is caused to a workman:

(1) By reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for, or used in the business of the employer by reason of any defect in the construction of any stages, scaffolds, or other erections erected by or for the employer, or in the materials used in the construction thereof; or (2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or (3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed; or (4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by the employer or by any person delegated with the authority of the employer in that behalf; or (5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive, engine, machine or train upon a railway, tramway or street railway.

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Of these, the second case is the only one that could possibly be suggested, but it does not apply, inasmuch as the superintendence referred to, as is shewn by the English and Canadian authorities, and also by the interpretation clause of the Act itself (sec. 2, sub-sec. 1),* is a superintendence over workmen, and the engineers were not persons exercising superintendence of that kind nor indeed of any kind for that matter, and, moreover, neither of them is charged in the statement of claim with negligence in the exercise of any superintendence.

At common law, it is impossible for the plaintiff to recover inasmuch as the accident happened by reason of the negligence of a fellow-servant. The only duties cast upon an employer who does not personally superintend the work are to supply at the outset fit and proper premises, fit and proper appliances and machinery, a proper system and competent agents and officers. These things having been done the liability of the employer ceased. *Wilson* v. *Merry, supra; Rajotte* v. *Canadian Pacific Railway Co.* (1889), 5 Man. 365; *Wood* v. *Canadian Pacific Railway Co.* (1899), 6 B. C. 561; (1899), 30 S. C. 110; *Rudd* v. *Bell* (1887), 13 O. R. 47; *Matthews* v. *Hamilton Powder Co.* (1887), 14 Ont. App. R. 261; *Howells* v. *Landore Steel Co.* (1875), L. R. 10 Q. B. 62; *Hedley* v. *Pinkney & Sons S. S. Co.* (1894), A. C. 222.

The argument that the doctrine of common employment does not apply, because the so-called fellow-servants whose negligence caused the accident (that is, the engineers) were not in the defendants' employ at the time when the accident happened, or indeed while the person injured was working for the defendants, is of no force. That point is dealt with, though merely *obiter*, by Lord Cairns in *Wilson* v. *Merry, supra,* at page 332.

Judgment.

THE CHIEF JUSTICE:—In this case the jury have found that the company, acting without reasonable care and skill, have been the cause of the accident complained of by their failure to provide proper and accurate working plans of the shaft wherein the accident occurred.

That there is ample evidence to support that verdict, which is conceded to be a finding of negligence at common law, is not denied by the Court whose judgment in favour of the respondent, notwithstanding that verdict, is appealed from.

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* (1) The expression "superintendence" shall, unless a contrary intention appears, be construed as meaning such general superintendence over workmen as is exercised by a foreman, or person in like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour.

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The ground upon which the Court reached their conclusion against the action is that these plans were made either by one Stewart or one Turnbull, who were competent employees, and must be considered as fellow workmen of the appellant, as the Court holds, though they had ceased to be in the service of the company before the appellant entered their service, and had not been employed since.

In my opinion that view of the law on the subject, taken by the judgment appealed from, is erroneous.

A fellow-servant in the common employment of a common master must be a co-worker, a collaborateur, and a colloborateur is one with whom a work is carried on, though it need not be in the same branch or department. An employee who has left the service of a company cannot be said to be a co-worker or a collaborateur of all its future employees. Yet, that is what the judgment appealed from necessarily imports. He has ceased to be a worker at all; therefore, he cannot be a co-worker.

In entering its service, an employee impliedly covenants to take upon himself the risks of the negligence of those working with him, with whose habits, conduct and competence he may, in the course of his employment, become acquainted or hear of, and against whose carelessness, listlessness, bad habits or incompetency he has an opportunity to protect himself as he may deem best. But he does not assume the consequences of all past negligent acts of his predecessors.

Then under the finding of the jury and the evidence, the respondents have committed a breach of the common law obligation that they impliedly contracted towards the appellant when he entered their service, of providing the adequate materials and a reasonably safe place in which he was to work and a reasonably safe system for the carrying on of the works in which they agreed to employ him. I would not think the operating of a mine of this kind, without a plan, or with a defective and deceiving plan, which is worse, a reasonably safe system of carrying on the operations.

And it is no defence to his claim for injuries received in the course of his employment, in consequence of their failure to fulfil such a positive duty, that the accident was the result of the negligence of some one else upon whom they relied for the performance of such duties that the law imposes upon them personally, whether they act, or have to act, in the matter through other persons or not.

I would allow the appeal with costs and grant the appellants' motion for judgment on the verdict of the jury with costs.

SEDGEWICK and DAVIES, JJ., concurred in the judgment allowing the appeal and ordering a new trial for the reasons stated by NESBITT, J.

SEDGEWICK, J

DAVIES, J.

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NESBITT, J.

NESBITT, J.:—This action is brought under the Employers' Liability Act, chapter 59 of the Revised Statutes of British Columbia (1897), and in the alternative at common law.

It is an action for damages resulting from the death of Charles Hosking, which occurred on the 23rd day of August, in the metalliferous mine called the Josie, at Rossland, B.C., owned and operated by the respondent company, it having acquired this property in July, 1901.

The deceased, with three others, was working in the bottom of the Josie shaft sinking it deeper, and was 565 feet directly below the point in the Josie shaft where the 300-foot level runs into the Josie shaft; in the roof of this 300-foot level and directly under the Annie shaft (then not sunk down to the 300-foot level) were men working raising from the 300-foot level to the bottom of the Annie shaft.

The Annie shaft had been sunk by the respondents' predecessors in title and, as I read in the evidence, a certain amount of work had been done by the respondents; but, however this is, it is quite plain that at the date of the accident the foot of the Annie shaft was about 14½ feet from the top of the level. I extract from the evidence of William Thompson, the general superintendent and general manager of the mine:

Q. Now what was the distance between (producing exhibit 1) the foot of the Annie shaft and the top of the level marked on plan No. 1 as the 300 foot level?

A. Approximately about 14½ feet.

Q. How many feet—what would be the rock necessary to go through in making the upraise to connect with the Annie shaft?

A. About 12 feet.

Thompson, the general superintendent, gave Kenty, the mine superintendent, instructions to have the pumps repaired and put in this Annie shaft in order to pump water out which was in it while the work was proceeding in the up-raise from the 300-foot level; and apparently Kenty gave these instructions to the machinist who was getting the pumps ready preparatory to pumping in a proper manner. Thompson and Kenty thought that the bottom of the Annie shaft to which they were raising was about 75 feet above the roof of the 300-foot level, and consequently supposed they would have plenty of time to pump the water out while the work in the upraise was being proceeded with. That the upraise was made to the extent of about 12 feet when the next blast allowed the water from the Annie shaft to escape into the 300-foot level along which it rushed and descended upon the deceased with great force, who was working at the bottom of the Josie shaft, killing him. The questions given to the jury and their answers read as follows (*vide supra*):

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Upon this the trial Judge, Mr. Justice MARTIN, gave judgment in favour of the defendants on the ground that the answers were answers solely referable to common law negligence, and that the negligence, if any, was the negligence of Turnbull in not properly platting the plan, and that this was negligence of a fellow employee.

This judgment was affirmed by the Full Court of British Columbia.

The system as to plans as it was adopted is described by Thompson as follows:

Q. What method is usualy adopted in large mines with respect to keeping track of work done in the mine; that is, to keep track of levels, tunnels, winzes and all that sort of thing?

A. Usually, the employment of a competent engineer who is held responsible for the correctness of the work.

Q. What are the duties of this competent engineer?

A. To make surveys; make his notes and plat the results.

Q. What was done in that regard in the Le Roi No. 2, from the time of the commencement of the work?

A. That was the method followed.

The previous owners had begun the sinking of the Annie shaft, and they had in their employ when they first began operations, a Mr. R. H. Stewart, then stated to be one of the best mine operators in the west, and he was succeeded by Mr. Turnbull (who is described as a competent man, a graduate of McGill University), and both of these gentlemen were subordinate and reported to Mr. Thompson. Their duties were to survey the mine and record the survey notes in books kept in the office for the purpose, and to plat and keep the plan up to date. At the time of the accident Mr. Thompson states that the notes were in existence in the office, and that these notes showed that the distance between the bottom of the Annie shaft and the top of the 300-foot level was 14½ feet. The survey engineers had neglected to plat these notes upon the plan and Mr. Thompson neglected to see that the vertical plan was up to date, and that his orders in that respect were complied with. He knew of the notes and that they were in existence, but he simply made a casual examination of an old report from which he gathered that there was a distance of 75 or more feet between the bottom of the Annie shaft and the 300-foot level, and so gave the negligent order to commence the upraise which I have described.

On appeal to this Court it was argued for the first time that there had been a breach of the Inspection of Metalliferous Mines Act of British Columbia (1897), ch. 27, sec. 23,* in this that no accurate

* 23. The owner, agent, manager, or lessee of every mine to which this Act applies shall keep in the office of the mine, or in the principal office of the mines belonging to the same owner in the district in which the mine is

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plan had been kept in the office of the company. In my opinion an examination of the language in this section shews that this contention is not tenable. The provisions of that section, instead of imposing upon the mine-owner the absolute duty to have accurate and sufficient plans, seem rather to support the view that such is not the absolute duty of the mine-owner himself since he is not liable to the penalty† if he can show ignorance of the imperfection or inaccuracy.

The company provided a proper system of surveying and plan making and employed men, apparently efficient, to carry out the system.

Any inaccuracy or want of completeness in the plans would be due to the default of those so employed, of which an employer at a distance could not be expected to be aware. And it seems immaterial that there was a change of surveyor before the deceased came into the company's employ.

But even if there was negligence in the surveyor, the jury might well have found, also, negligence on the part of Thompson in not seeing that the system was properly carried out, as well as in giving the directions for the upraising, in the absence of accurate information respecting the Annie shaft, without having the water pumped out. This, at common law would be negligence of a co-employee for which the employer would not be responsible, but sub-section (2) of section 3 of the Employers' Liability Act, R. S. B. C. c. 69, imposes upon an employer responsibility for the negligence of any person who has any superintendence entrusted to him while in the exercise

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situated, an accurate plan of the workings of such mine, showing the workings up to at least six months previously, other than workings which were last discontinued at a date more than twelve months before the commencement of this Act.

(1) (Provides for production to Inspector of Mines.)

(2) If the owner, agent, manager, or lessee of any mine fails to keep such plan as is prescribed by this section, or wilfully refuses to produce or allow to be examined such plan, or wilfully withholds any portion of any plan, or conceals any part of the workings of his mine, or produces an imperfect or inaccurate plan, unless he shews that he was ignorant of such concealment, imperfection, or inaccuracy, he shall be guilty of an offence against this Act; and, further, the Inspector may, by notice in writing (whether a penalty for such offence has or has not been inflicted), require the owner, agent, manager, or lessee to cause an accurate plan, such as is prescribed by this section, to be made within reasonable time, at the expense of the owner or lessee of the mine, on a scale of not less than a scale of thirty feet to one inch, or on such other scale as the plan used in the mine is constructed on.

(3) If the owner, agent, manager, or lessee fail, within twenty days, or such further time as may be shewn to be necessary, after the requisition of the Inspector, to make or cause to be made such plan, he shall be guilty of an offence against this Act.

Provided that this section shall apply only to a mine to which this Act applies, and in which more than twelve persons are ordinarily employed below ground.

† Imposed by secs. 29-30.

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of such superintendence. And it is quite possible to treat the answer of the jury to the 4th question as including the negligence of any person for whose acts or omissions the company is responsible.

While the record of the case appears to justify the view of the Court below, that the plaintiffs' case was directed mainly to establishing liability at common law, the learned Judge who presided at the trial left it open to the jury to find for the plaintiffs under the Employers' Liability Act; and although the questions put to the jury did not distinctly point to any specific phase of the Act, the jury could have given answers clearly finding facts establishing liability under it. It does not appear that the plaintiffs have ever abandoned the alternative claim.

As there was not sufficient evidence to warrant judgment against the company upon the principles of the common law, and the damages assessed went beyond the limit allowed under the Employers' Liability Act, there could not well have been a judgment for the plaintiffs for any sum. But it appears to us that, as there was evidence warranting a verdict against the company under the statute, and as the findings of the jury do not negative the liability, the judgment should not stand.

The appeal should be allowed, with costs, and a new trial ordered, no costs of the appeal to the Full Court in British Columbia; costs of the former trial to abide the event.

KILLAM, J., concurred in the opinion of Mr. Justice Nesbitt. KILLAM

Appeal allowed with costs.

NOTE.—For other cases on negligence in mining operations: see *McKelvey* v. *Le Roi Mining Co., Ltd., ante*, p. 13; *Gunn* v. *Le Roi Mining Co., Ltd., ante*, p. 53; *Hastings* v. *Le Roi No. 2, Ltd., ante*, p. 81; and *Leadbeater* v. *Crow's Nest Pass Coal Co., post*, p. 145.

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IN RE THE COAL MINES REGULATION ACT.

(10 B. C. 408.)

Coal Mines Regulation Act—Chinese in Coal Mines—Rule Prohibiting Employment of, in Certain Positions—Constitutionality of—B. N. A. Act, sec. 91, sub-sec. 25, and sec. 92, sub-secs. 10, 13—Naturalization and Alienage—R. S. B. C. 1897, cap. 138, sec. 82, r. 34, and B. C. Stat. 1903, cap. 17, sec. 2.

Rule 34 of the Coal Mines Regulation Act of British Columbia, as amended in 1903, prohibiting Chinamen from employment below ground, and also in certain other positions in or about coal mines, is *ultra vires*, MARTIN, J., dissenting.

Union Colliery Co. v. *Bryden* (1899), A. C. 580, 1 M. M. C. 337, applied and distinguished from *Cunningham* v. *Tomey Homma* (1903), A. C. 151.

Observations by MARTIN, J., on the origin of Chinese in British Columbia.

Statement.

QUESTION referred to the Full Court of the Supreme Court of British Columbia under sec. 98 of the Supreme Court Act by the Lieutenant-Governor in Council of British Columbia for hearing and determination. The question referred by Order in Council, dated 9th December, 1903, was:

Whether rule 34 of section 82 of ch. 138 of the Revised Statutes, 1897, being the Coal Mines Regulation Act, as enacted by sec. 2 of ch. 17 of the statutes of 1903, was within the competence of the Legislature of British Columbia to enact, in so far as it provides that no Chinaman shall be appointed to, or shall occupy, any position of trust or responsibility in or about a mine subject to the Coal Mines Regulation Act, whereby through his ignorance, carlessness or negligence he might endanger the life or limb of any person employed in or about such mine, namely, as banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer, or be employed below ground or at the windlass of a sinking-pit.

The matter came on for argument at Victoria on 23rd December, 1903, before HUNTER, C.J., IRVING and MARTIN, JJ.

Argument.

Wilson, A.-G., for the Crown:—This legislation has stood with some few modifications since 1873, and although the fact of its so standing does not conclude the question, it is significant.

The principal cases to be considered are *Union Colliery Co.* v. *Bryden* (1899), A.C. 580, 1 M. M. C. 337, and *Cunningham* v. *Tomey Homma* (1903), A. C. 151. *Bryden's Case* is distinguishable, as there

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the facts were different, the persons affected all being aliens, and besides it was a civil action; the decision in it is only binding when a precisely similar state of facts is shewn to exist; the judgments in the *Homma Case* (besides the judgments in the case itself) shew that the *Bryden Case* went on the ground that the legislation there under review was aimed against aliens.

The rule (34) is one intended solely for regulating the working of coal mines; it is one which deals with local undertakings; all Chinamen, irrespectively of their nationality or residence or state rights, are under the ban; it is an exclusion against them as a race, and that is what was held to be lawful in the *Homma Case* so far as the franchise is concerned.

The Lords of the Privy Council inclined to the opinion in the *Bryden Case* that the leading feature of the then enactment was the exclusion of aliens. It is submitted that the clear intention of the Legislature in the rule now in question was the regulation of the coal mines irrespectively of race or nationality.

The Court will require very strong reasons before it will come to the conclusion that this is not a regulation, but is rather an attempt by the Legislature to do circuitously what it had no power to do otherwise.

Argument.

A. E. McPhillips, K.C., on the same side: In B. C. Stat. 1902, ch. 32, the same rule was enacted, except that the word "Japanese" followed after "Chinamen;" but that legislation was disallowed on 5th December, 1902: see the report in Sessional Papers, B.C., 1903.

There is no recital of the obnoxious features of Chinamen or of the disasters resulting from their employment, but that does not detract from the force of the enactment if it really is a rule for the regulation of the mines: Cooley's Constitutional Limitations, 5th Ed., 38: the regulation is for the protection of life and limb, and is peculiarly within the province of the local Legislature: two classes are classified as dangerous, *viz.:* Chinamen and people who do not speak English: the Chinaman *per se* has a verdict against him by the Legislature which says he is a menace to life and limb in a coal mine; it is not a question of whether he can or cannot speak English. The Legislature has as against the Chinaman made the finding which is without appeal that the Chinaman is ignorant, careless and negligent, and by reason thereof is a source of danger to those employed in or about a mine, and is, therefore, expressly legislated against, and there is absolute inhibition against his employment in the stated capacities or below ground.

Coal mines are local works and undertakings and subject to legislative control by the Province (B. N. A. Act, sec. 92, sub-secs. 10 and

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13), and even if the Legislature fell into error on the facts, and the class legislated against are not a menace to life or limb, the matter is concluded by the legislation—the Court cannot rectify it; it would amount to legislation upon the part of the Court, and an appeal to the Court from the express pronouncement and enactment of the Legislature.

It is on the face of it only a regulation because the Chinaman is not prevented from working above ground in some capacities; by other statutes of the Province we see that Chinamen and Indians are absolutely prohibited from holding a liquor licence.

The decision of the Privy Council in *Bryden's Case* is qualified to a large extent by that in *Homma's Case;* in the former there was a total inhibition against Chinamen, but not by way of regulation; further, *Bryden's Case* proceeded largely upon admissions and that the legislation in its application affected persons as aliens or naturalized subjects, and was not of general application; the latter decided that once you get beyond alienage and naturalization you are within the powers of the Provincial Parliament; the judgment of Lord Halsbury in the latter and that of Lord Watson in the former can't be reconciled.

He referred particularly to *Cunningham* v. *Tomey Homma, supra,* at pp. 154, 156, 157; *Union Colliery Co.* v. *Bryden, supra* ; and distinguished the one case from the other and shewed how some of the text of Lord Watson's judgment could only be reconciled upon the view that it proceeded upon admissions allowing of certain conclusions being drawn, but that the judgment could not be construed as determining the question involved in this reference, and, further, the Lord Chancellor's judgment in the *Homma Case* was a clear exposition of the line of demarcation between the Federal and Provincial powers, *i.e.,* the Federal authorities dealt with alienage and naturalization—but legislation not aimed at any interference with such authority could not be reasonably said to contravene Federal powers, and, therefore, was *intra vires* legislation when in respect to a matter of legisation within the classes of subjects of exclusive provincial legislation as set forth in sec. 92 of the B. N. A. Act: *Hull Electric Co.* v. *Ottawa Electric Co.* (1902), A. C. 237, and Am. & Eng. Encyclopædia of Law, 2nd ed., vol. 6, p. 1,080, were also referred to.

Cur. adv. vult.

18th April, 1904.

Judgment.

HUNTER, C.J.:—In *Bryden* v. *Union Colliery Co., supra,* the question as to the competence of the Provincial Legislature to enact section 4 of the Coal Mines Regulation Act, being R. S. B.

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C. (1897), ch. 138, by which it was provided *inter alia* that no Chinamen should be employed below ground in any coal mine to which the Act applied, came up for decision, and their Lordships answered the question adversely to the Province.

By rule 34 enacted in section 82 of the same Act, as amended by 1903, ch. 17, sec. 2, it is provided as follows:

"Rule 34: No Chinaman or person unable to speak English shall be appointed to or shall occupy any position of trust or responsibility in or about a mine subject to this Act, whereby through his ignorance, carelessness or negligence he might endanger the life or limb of any person employed in or about a mine, viz.: As banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer, or be employed below ground or at the windlass of a sinking-pit."

Acting under the authority of this rule and of the penalizing sections of the Act, the Provincial Government caused informations to be laid against the manager of the Wellington Colliery Company, Limited, which owns and operates a coal mine within the meaning of the Act, situate at Comox, with the result that some 74 convictions have been recorded, and a large aggregate of fines imposed for employing Chinamen below ground contrary to the provisions of the rule.

The company has taken out rules *nisi* to quash the convictions, but His Honour the Lieutenant-Governor considering, under the advice of his Ministers, that the constitutionality of this enactment should be decided as quickly as possible, has, under the authority of the Supreme Court Act, referred the question to the Full Court in the following terms:

"Whether the said rule as re-enacted as aforesaid was within the competence of the Legislature of British Columbia to enact in so far as it provides that no Chinaman shall be appointed to or shall occupy any position of trust or responsibility in or about a mine subject to the "Coal Mines Regulation Act," whereby through his ignorance, carelessness or negligence he might endanger the life or limb of any person employed in or about such mine, viz.: As banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer ,or be employed below ground or at the windlass of a sinking-put."

A special sittings of the Full Court was accordingly held, and at the opening of the proceedings the learned *Attorney-General* and Mr. *A. E. McPhillips* appeared for the Crown, and Messrs. *Cassidy* and *O'Brian* for the company.

It was made apparent to us at the outset that the learned counsel had failed to agree upon the terms in which the question should be stated for our opinion, and a suggestion that the order of reference should be amended by setting out some of the convictions and requesting the opinion of the Court as to their validity was not accepted by the learned Crown counsel, with the result that the counsel for the company withdrew from the proceedings. This of course is un-

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fortunate, as although we are bound to consider the question submitted in conformity with the request of His Honour, we labour under the disadvantage of not hearing what there is to be said against the legislation.

However, after hearing the elaborate arguments of the learned counsel for the Crown, I am of the opinion that the decision in the case of *Bryden* v. *Union Colliery Co.*, already referred to, concludes the matter, and that we should answer His Honour's question in the negative. That case expressly decided that the enactment that no Chinaman shall be employed below ground was *ultra vires* of the Legislature of the Province on the ground that the leading feature of the legislation is to debar all persons belonging to a named nationality from engaging in a particular employment or class of labour, and that power to pass legislation of this character resides in the Parliament of Canada to the exclusion of the Legislatures of the Provinces.

Rule 34 is, *quoad* this question, an identical re-enactment of the legislation thus reviewed, and is therefore to such an extent null and void.

It was strenuously pressed upon us by the learned counsel that the rule was a mere regulation affecting the mode in which coal mining below ground is to be carried on, and that the expression "No Chinaman" has no reference to the question of nationality or alienage (just as would have been the case had the expression been, for example, "No Indian," "No Mormon," or "No Jew," terms which do not connote the idea of nationality), but is merely descriptive of a race or class which, wherever resident or born, is unsuited by certain idiosyncracies from being safely employed below ground. But, granting all this, and that legislation which did not purport to shut the door against a given nationality would be competent to the Province, the short answer is that the identical expression was used in the legislation passed upon by the Judicial Committee, and it is impossible to suppose that the expression is used in any other sense in the rule.

If the Legislature intended to make a regulation prohibiting a particular class from being employed below ground, which would not necessarily be open to the interpretation placed upon the enactment before the Judicial Committee, it would have been a simple matter to do so, but to re-enact legislation which has already been declared within the exclusive jurisdiction of the Parliament of Canada, without taking care to exclude such interpretation, is merely to invite the same decision.

It was, however, contended by the learned counsel that the authority of *Bryden* v. *Union Colliery Co.* is impaired by the later decision in *Cunningham* v. *Tomey Homma, supra.* For my part I do not see what the one decision has to do with the other. The

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questions raised in the two cases are not in the same plane. The one case decided that the power to exclude a particular nationality from a given employment was vested in the Parliament of Canada, and the other that each Legislature in the exercise of its power to regulate the provincial franchise could exclude any particular nationality from the right to vote. Indeed with great respect for the learned Judges who held otherwise, I should have thought that the right to pass the legislation reviewed in the *Tomey Homma Case* followed as a self-evident corollary from the grant of the power to amend the constitution of the Province. If the Legislature under such a power could not from time to time enact who should constitute the electorate, it is difficult to see the use of the power or why it was conferred. However, it is not necessary to pursue the matter any further; suffice it to say that if we were to hold that the present case is not the case of *Union Colliery Co.* v. *Bryden* over again, we should virtually say that that decision is *brutum fulmen.*

In my opinion His Honour's question must be answered in the negative.

IRVING, J.

IRVING, J.:—In the reasons for judgment in the *Bryden Case* Lord Watson narrows the case down to this single question whether the enactments of the fourth section of the Coal Mines Regulation Act, in so far as they related to Chinamen, were within the competency of the Provincial Legislature.

He then proceeds as follows:

> "The leading feature of the enactments consists in this—that they have, and can have, no application except as to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia."

The judgment then declares that as the legislation then under consideration was a matter which directly concerned the rights, privileges and disabilities of aliens or naturalized subjects, it was *ultra vires* of the Provincial Parliament.

It is stated by counsel for the Crown that in the course of argument of the *Bryden Case* before the Judicial Committee an admission or a concession was made by counsel that enabled that body to decide as they did. I am unable to find any trace of such an admission in the reasons for judgment to which we have been referred; on the contrary, I see a distinct statement that the only point for consideration was the constitutional question as to whether section 4 was or was not *ultra vires.* Moreover, I do not think any admission of counsel could affect a decision touching the construction of a constitutional statute.

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Then we were referred by counsel for the Crown to the *Tomey Homma Case.* It was said that the decision in that case explained away the decision in the *Bryden Case* and left us free to deal with the enactment contained in rule 34, untrammelled by the decision given on section 4 of the Statute of 1890.

The dictum in the *Tomey Homma Case,* as I understand it, reaffirms the decision in the *Bryden Case.*

In *Tomey Homma's Case* the question involved in the appeal was the constitutionality of the Provincial Act which prevented a Japanese from obtaining electoral privileges in provincial elections.

In delivering the judgment in that case the Lord Chancellor drew a distinction between privileges and rights, that is to say, privileges which might or might not follow as a consequence of naturalization and the right of protection (which as the correlative of the obligation of allegiance) was necessarily involved in the nationality conferred by naturalization.

The protection to which he referred was "that general protection of the King (whereof Littleton here, s. 199, speaketh) which extends generally to all the King's loyal subjects, denizens and aliens within the realme."

He then stated that the *Bryden Case* was decided on this ground —that the Provincial Legislature could not deprive the Chinese in this Province, whether naturalized or not, of those ordinary rights which belong to every inhabitant of British territory. (1898, A. C. 73, 155.)

I understand him to mean that the Provincial Parliament while at liberty to refuse to accord to a naturalized subject a privilege, cannot deprive an alien of those fundamental rights to which every person living under the ægis of the British Sovereign is entitled. The power to legislate as to these rights is reserved to the Dominion Parliament by sub-section 25 of section 91, and the proviso at the end of that section.

The point submitted to us is as to the constitutionality of an enactment which declares that no Chinaman shall be

"appointed to or shall occupy any position of trust or responsibility in or about a mine subject to this Act, whereby through his ignorance, carelessness or negligence he might endanger the life or limb of any person employed in or about a mine, viz.: As banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer, or be employed below ground or at the windlass of a sinking-pit."

Now, in what respect does this differ from the legislation considered in the *Bryden Case?* The calling of the enactment in question a rule or regulation can not affect its constitutionality, nor can the enactment derive any greater validity by reason of its insertion in the middle of a rule which in other respects may be *intra vires.*

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IRVING, J.

Is not the pith and substance of this so-called rule to prevent Chinamen from working underground, regardless of their individual fitness or capacity to properly perform the work?

In the paragraph quoted, I can see no rule or regulation, established or sought to be established, by which the fitness of a Chinaman to properly perform the work of an underground miner can be tested. He may speak the English language perfectly; he may be a skilled mining engineer; but these points are immaterial. He is debarred by reason of the fact that he is a Chinaman. I refer to these matters not because I wish to discuss the policy or impolicy of the enactment, but in order to shew, by the absence of these tests, that there is in truth no real difference between this statute of 1903 and the statute of 1890 considered in the case of *Bryden* v. *Union Colliery Co.*

For these reasons I think the decision in the *Bryden Case* should govern our answer to the question submitted to us.

MARTIN, J. dissenting.

MARTIN, J.:—What has to be decided on this reference is whether the Legislature of this Province has exceeded the power it admittedly possesses to regulate the working of coal mines.

Now on the face of it, the rule in question does purport to do more than that, and the full title of the statute by virtue of which it is passed declares that it is "An Act to make Regulations with respect to Coal Mines." And the particular section, 82, which sets out the rules, 35 in number, calls them "general rules," and says they "shall be observed so far as is reasonably practical in every mine to which this Act applies." And that as a group they are necessary rules for the regulation of coal mines in fact as well as in name appears by a perusal of them. They deal with various subjects of the first importance to the safety of miners, such as ventilation, fencing, safety lamps, explosives, water, signals, inspection and similar matters. The last one, 35, creates the offence for contravention; and No. 34 is that under consideration.

It deals with two classes of persons—Chinamen and "persons unable to speak English," and debars them from being employed in certain specified "positions of trust or responsibility in or about a mine." The said prohibited positions are banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer, or at the windless of a sinking-pit, or below ground. Some reasons for this proscription of a Chinaman or other person as mentioned are given, and they are that "through his ignorance, carelessness or negligence he might endanger the life or limb of any person employed in or about a mine." From this language, it is apparent that the Legislature, rightly or wrongly, entertains the belief that the presence of said proscribed persons in or about a mine is fraught with danger to

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others. Now it is abundantly clear that if the Legislature has constitutional control over a certain matter it need give no reasons for the exercise of it, and, further, that if it had or gave reasons which it thought were sufficient, but which in reality were grounded upon erroneous beliefs or ideas, nevertheless its acts cannot be successfully impeached on that ground. It is the possession of the requisite power, and not the assignment of reasons for its exercise, that determines the constitutionality of a legislative enactment. Given the power, it may lawfully be exercised on bad or no reasons and in pursuance of a mistaken policy, but the discretion so exercised is not open to review, because within its constitutional jurisdiction the Legislature is supreme, and if, to apply that principle to the present case, no part of the federal jurisdiction can be found to apply to this matter, then the Provincial Legislature is the absolute master of the situation. If, in support of such a proposition, it were necessary to cite authority it will be found in the case of *Bryden* v. *Union Colliery Co.* (1899), A .C. 580, 1 M. M. C. 337; and in *Tomey Homma's Case* (1900), 7 B. C. 368 (1903), A. C. 151. In the former of which at pp. 584-5 it is stated:

"But the question raised directly concerns the legislative authority of the Legislature of British Columbia, which depends upon the construction of ss. 91 and 92 of the British North America Act, 1867. These clauses distribute all subjects of legislation between the Parliament of the Dominion and the several legislatures of the provinces. In assigning legislative power to the one or the other of these parliaments, it is not made a statutory condition that the exercise of such power shall be, in the opinion of a court of law, discreet. In so far as they possess legislative jurisdiction, the discretion committed to the parliaments, whether of the Dominion or of the provinces, is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but, when that point has been settled, courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not. There are various considerations discussed in the judgments of the Courts below which, in the opinion of their Lordships, have as little relevancy to the question which they had to decide as the evidence upon which these considerations are founded."

And in the latter, at p. 155:

"The policy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider."

Doubtless if the circumstances were such that it plainly appeared that the Legislature under the guise of adopting an otherwise legal legal course, was indirectly attempting to do something which was *ultra vires* and thus *mala fide* break the bounds of its constitutional limitation, the Court would not hesitate to put the proper construction upon such methods (see *Tomey Homma's Case*, p. 157), but an intention of that should not be lightly imputed, and I see no ground on the whole facts for inferring it here.

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Seeing that, as has been noticed, some reasons are given for the present enactment, it may not be out of place to remark that, as regards one of the two classes aimed at, those unable to speak English, any one who has any knowledge of mining operations knows that the reason given is a valid one, for the presence of such persons in a coal mine is plainly undesirable because their ignorance of the language of the country involves the failure to readily understand and obey orders, which would be an additional source of danger to their fellow-workmen, and it could not be seriously contended that the Legislature had not the right to exclude such "ignorant" and consequently dangerous persons from the mines. On this ground a Chinaman who could not speak English would, in common with all others likewise deficient, be properly excluded quite apart from the question of his race or origin. That disqualification, in short, is linguistic—not racial or national—and in this respect there is no difference in treatment between Chinese and others, and consequently no possible ground of complaint. For example, there are many natural born British subjects in Canada, particularly those of French origin, who cannot speak English, but no one would suggest that their exclusion for that reason would not be within the powers of the Legislature, and to that extent at least the enactment is undoubtedly *intra vires*. But, it may be said, the real difference is that, as regards a Chinaman, he is barred as such, even though he possesses the linguistic qualification, that is to say, he is also barred simply because he is a Chinaman racially or nationally, as well as linguistically, hence a dual bar. I pause here to say that though it has been seen that it is unnecessary to give reasons for exclusion, and that it is immaterial even if such reasons are invalid on the face of them, nevertheless I do not wish it to be understood that I consider further reasons (and at least plausible ones) could not have been given or may not have been present to the mind of the legislators in framing this portion of the rule regarding Chinese. It may well be that the members of the House believed, rightly or wrongly, in the existence of several racial peculiarities in that people which have in this Province been largely attributed to them, such as fatalistic tendencies, light estimation of the value of human life and consequent carelessness and neglect in the taking of necessary precautions in a hazardous occupation, apathy to suffering, liability to panic in presence of danger, and absence of that *esprit de corps* which affords such great assistance to fellow workmen when called upon without warning to face a sudden peril, particularly when underground. I do not for a moment say that any or all of such beliefs as regards Chinese in British Columbia is or are well founded, or that I share them, or that if they exist they may not in other occupations be more than compensated for by the possession of admirable qualities such as patience, industry and thrift, but un-

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doubtedly there are very many in this Province who do entertain some or all of such beliefs to a greater or less extent.

The extent to which qualities so undesirable in an employment already sufficiently hazardous exist in the general body of Chinese residents in British Columbia is one which would not only be a legitimate but most proper subject for consideration by the Legislature of this Province in regulating the employment of such residents in mines. The fact that the exclusion is only partial, and that they are permitted, generally speaking, to engage in those numerous branches of labour "in or about mines" which are being carried on above ground shews on the face of it a willingness to allow them to earn their bread in coal mining so long as they do not endanger the safety of others. And be it further remarked that simply because a resident of British Columbia of any race is prevented from working underground he has no just cause of complaint. The rule might properly have provided that no person under age, and no woman should be so employed, though the effect would be to bar considerably more than half the whole population of Canada from that employment. It happens that it is not the custom in Canada for women to work in coal mines, and so that illustration would not possibly without reflection appeal to some; but it must be remembered that it is, or till very lately was, the custom in some highly civilized countries in Europe, and that, for example, great numbers of women were so employed in France, and to such an extent that the employment was made the subject of a well-known book by one of the greatest authors of that country: I refer to "Germinal," by M. Zola.

To take another striking illustration in this country of the power of Parliament to wholly exclude a large body of its citizens, being natural-born British subjects—Canadians—from a great and lucrative branch of business, I refer to the case of the Indians throughout Canada, who, according to the last census (1901) amount to 93,460 of pure blood and 34,481 half-breeds. Not only is it declared by the Federal Legislature (which has the control of Indian affairs) to be a crime to supply liquor to one of these aboriginal natives of our country, but it is also a crime for him to have even a glass of intoxicating liquor in his possession (Indian Act, R. S. C. 1886, ch. 43, secs. 94, 96), the consequence of which is that he is shut out from several very important and lucrative branches of trade and commerce, such as distilling, brewing, the wine, spirit and saloon trade, and, almost wholly, inn-keeping. This is a sweeping proscription, but it is considered, rightly or wrongly, that the North American Indian is so inherently constituted that indulgence in intoxicating liquor has such an exceptionally inflammatory effect upon him that the public safety demands he should so far as possible be removed from temptation to indulgence therein. Now, supposing that the inherent defect in the Indian took a different form, and was of

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such a nature that the Legislature of British Columbia deemed it unsafe to others to allow him to work underground in a mine, or that the 17,437 persons of the negro race resident in Canada should be deemed to labour under a like infirmity, and that the rule in question had read "no Indian and no Negro," instead of "no Chinaman," can there be any doubt at all about the constitutionality of such a provision? In my opinion, clearly not. And what greater rights in this country have, or should have, the Chinese as a race than the Indians of Canada, almost all of whom are natural born British subjects, or than the Negro natural born subjects of the Crown? The term "Indian" or "Negro" would clearly be used in a racial and descriptive sense, and hence unassailable.

Assuming, for the moment, the fact to be that the presence of Chinese underground was a real danger to other workmen, and that the Legislature expressly dealing with them as a race and not as a nation passed a regulation prohibiting their employment underground, it must, in my opinion, be admitted that this would be within its powers. To contend otherwise would be to assert that the power does not exist, though it admittedly does exist somewhere. Now it cannot repose in the Federal Parliament; for that body can only, in this relation, deal with Chinese on their national basis as aliens or naturalized persons, therefore it must be in the Provincial Legislature.

It becomes necessary, then, to consider carefully in what sense the word "Chinaman" is employed in the section in question; for if it is used in a sense which is racial or descriptive, very different results may follow from the use of it in a national sense, which latter is that in which it has hitherto been regarded and considered. How necessary it is to definitely establish as a matter of fact the way in which this word is and has been used in this Province appears from *Bryden's Case*, wherein at p. 586, Lord Watson says, "the words 'no Chinaman,' as they are used in sec. 4 of the Provincial Act, were probably meant to denote, and they certainly include, every adult Chinaman who has not been naturalized." This not unnatural assumption of His Lordship, as based on the statements of counsel before him and the facts as then presented, of the "probable" narrow and restricted meaning of the words, will be found to be very far from the fact.

Illustrations in addition to those already given of the way in which words in this country are used racially and descriptively, though originating in nationality, are not wanting. Thus we have the term "French Canadians" as applied to our very numerous fellow citizens of French origin, though for over 140 years they and their fathers have been subjects of the British Crown; and also the term "Jews" as applied to our fellow subjects, and others, in Canada

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of Hebraic origin, who no longer have a country or government of their own, and therefore are not now a nation, but a race dispersed among and the subjects of many and various nations, and whose designation is properly preserved only by adherence to their ancient religion.

Bearing then in mind the distinction between a term used racially and descriptively and one used nationally, and turning to the statute in question, it may at first sight and to one not familiar with the history of this branch of legislation appear strange that it does not contain any definition of the word "Chinaman." In such circumstances it is only fair to assume that the word was used by the Legislature in the same or a similar sense as that in which it had theretofore ordinarily employed it for many years in its various enactments dealing with that race, which must be taken to be the way in which it is ordinarily understood in this Province. The rule of construction is that "intelligible words . . . . must be construed according to their natural and ordinary signification" — *Attorney-General for Ontario* v. *Hamilton Street Railway* (1903), A. C. 524 at p. 528—and probably the best method of ascertaining that signification in the present circumstances is to find out the sense in which it has been used by the Legislature itself; this method was resorted to in the *Precious Metals Case: Bainbridge* v. *Esquimalt and Nanaimo Railway* (1895), 1 M. M. C. 98; 4 B. C. 181; (1896) A. C. 561; wherein Mr. Justice MCCREIGHT says: "Not merely do these contemporaneous Acts of the Province shew this, but antecedent legislation is in the same direction."

Referring then to the statutes of this Legislature, and beginning twenty years ago with the important "Act to Prevent Chinese from Acquiring Crown Lands," ch. 2, 1884, it is first enacted that it is unlawful for Crown land to be pre-empted by or sold "to any Chinese," or for "any Chinese" to divert water or obtain a water record; and then comes the following definition:

"3. The term Chinese in this Act shall mean any native of the Chinese Empire or its dependencies, and shall include any person of the Chinese race."

This is clearly aimed at the Chinese as a race as well as a nation inhabiting a particular locality. And the same feature is brought out in another Act passed in the same year—Ch. 3, entitled "An Act to Prevent the Immigration of Chinese," wherein it was enacted:

"2. It shall be unlawful for any Chinese to come into the Province of British Columbia, or any part thereof."

This statute was held to be *ultra vires*, but it is important as shewing the scope in which the word "Chinese" was employed, the definition thereof being as follows:

"1. The word 'Chinese' in this Act shall mean and include any native of China or its dependencies, or of any islands in the Chinese seas, not born of British parents or any person born of Chinese parents."

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This shews very plainly that it is the race and not the nationality or locality of birth that is objected to, for a natural born subject of the Chinese Empire was not excluded if he were born of British parents, though in law, fact and name he was, accurately speaking, a Chinaman. On the other hand, the child of Chinese parents domiciled in England and born there, or even in other Provinces of Canada, and therefore a natural born British subject, was excluded. Undoubtedly the word was not intended to be employed in a narrow and restrictive sense as regards this continent, for there are and were then many thousands of the Chinese race in United States territory on this Pacific Coast to the south of us, who, according to United States laws were natural born subjects of that country, and it is incredible to believe that the Legislature did not object to Chinese who were born on one side of the Pacific ocean under one flag and did object to the same race born on the other side of the same ocean under another flag. To a resident of this Province, such a contention would sound preposterous; and I do not think anyone who knows this country would be bold enough to advance it seriously.

In the Chinese Regulation Act, ch. 4, passed in the same year, a similar definition in section 2 is found with a like prohibition against "any person of the Chinese race."

That the same feature is constantly kept in view appears by all subsequent legislation dealing with the subject, of which the following may be taken as illustrative:

1885, ch. 13, sec. 1: An Act to Prevent the Immigration of Chinese.

1886, ch. 25, sec. 29: Vancouver Electric Light Company's Incorporation Act.

1886, ch. 26, sec. 13: Findlay Creek Mining Company's Incorporation Act.

1886, ch. 27, sec. 18: Vancouver Gas Company Act.

1886, ch. 29, sec. 21: Victoria and Saanich Railway Company's Act.

1886, ch. 30, sec. 12: New Westminster and Port Moody Telephone Company's Act.

1886, ch. 31, sec. 18: Vancouver Street Railway Company's Act.

1886, ch. 33, sec. 37: Coquitlam Water Works Company's Act.

1886, ch. 34, secs. 3, 4, 5: Nanaimo Water Works Amendment Act.

1886, ch. 35, sec. 38: Vancouver Water Works Act.

1890, ch. 50, sec. 29: New Westminster Electric Light and Motor Power Company's Act.

1891, ch. 48, sec. 60: British Columbia Dyking and Improvement Company's Act.

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1891, ch. 69, sec. 22: Nanaimo Electric Tramway Company's Act.

1895, ch. 59, sec. 5: Burrard Inlet Railway and Ferry Company's Incorporation Act.

1897, ch. 1, secs. 2, 3, 4: Alien Labour Act.

1898, ch. 28, sec. 2: Labour Regulation Act.

1899, ch. 29, sec. 36: Liquor Licence Act.

R. S. B. C., 1897, ch. 113, secs. 2, 5, 114: Land Act.

R. S. B. C., 1897, ch. 67, sec. 8: Provincial Elections Act.

These Acts shew a very remarkable adherence by the Legislature to the view that the Chinese are objected to not so much on the ground of nationality as on that of race. This is particularly brought home by the fact that the term "No Chinese" followed by the definition including the race is employed in the two statutes relating to labour matters above cited. The significance of this will be readily understood by the people of this Province who realize how carefully legislation relating to labour is watched because of its exceptionally broad application; and such terms therein employed may be safely taken as shewing how they are there used and understood not only by the Legislature but the people at large. The Land Act also, as being a public statute of the first importance, is likewise a safe guide, and it is noticeable that though by section 5 thereof an alien, generally speaking, after taking a declaration of intention to become a British subject, may pre-empt Crown lands, yet if he be "a Chinese" or of "the Chinese race" he cannot do so, although he may be a natural born British subject. Further, in the Liquor Licence Act, sec. 36, there is a very apt illustration of the way in which three classes of citizens are racially described and grouped as follows:

"36. No licence under this Act shall be issued or transferred to any person of the Indian, Chinese or Japanese race."

And the same thing occurs in the Provincial Elections Act, R. S. B. C. 1897, ch. 67, only brought out more clearly in section 3 by inserting in full the said standard definition, and apparently with the intention of making it clearer and wider (though in my opinion not really accomplishing that end) in the case of Chinese and Japanese, three words—"naturalized or not"—are added.

This section has been the subject of a judicial decision already noted and to which I shall refer later—*Tomey Homma's Case, supra.*

Having regard to the foregoing, it is abundantly clear to my mind that when the Legislature in 1903 passed the Act in question it then used the words "No Chinamen" in the sense in which it had so long and so often used them before, *i.e.*, racially and descriptively, as distinguished from the narrow local and national one. And a final test to apply to the language is, could it be even plausibly contended

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in case the Empire of China were broken up and distributed among other powers and its present Government wholly abolished, that the words in question "No Chinaman" had no longer any application? Clearly it could not; and indeed the operation of the Treaty of Nankin, 1842, whereby the Chinese Island of Hong Kong became British territory, shews how groundless such a view would be, because in 1901 there were almost 275,000 Chinese in that colony, and does any one suppose that they would not come within the said prohibition even if every one of them was a natural born British subject? Therefore it is manifest that the true construction of the said words depends not upon a nation which may lose its government and its territory, but upon a race which has within itself certain marked characteristics which appear to defy place and even time itself.

Even if the words are considered as applicable to a wider field than British Columbia, the same conception of their meaning officially prevails, as may perhaps be best illustrated by the instructions to officers taking the last Dominion Census, which will be found in the introduction to the Census Report of Canada for 1901, vol. 1, secs. 47-54, pp. xvii., xix., wherein the matter is fully gone into. I extract, for example, portions of No. 47 and No. 53:

"47. The races of men will be designated by the use of "w" for white, "r" for red, "b" for black, and "y" for yellow. The whites are, of course," the Caucasian race, the reds are the American Indian, the blacks are the African or Negro, and the yellows are the Mongolian (Japanese and Chinese). But only pure whites will be classed as whites; the children begotten of marriages between whites and any one of the other races will be classed as red, black or yellow, as the case may be, irrespective of the degree of colour."

"53. Among whites, the racial or tribal origin is traced through the father, as in English, Scotch, Irish, Welsh, French, German, Italian, Scandinavian, etc. Care must be taken, however, not to apply the terms 'American' or 'Canadian' in a racial sense, as there are not races of men so-called. 'Japanese,' 'Chinese' and 'Negro' are proper racial terms; but in the case of Indians, the names of their tribes should be given, 'Chippewa,' 'Cree,' etc."

Moreover, the Federal Parliament itself has for many years used the word in the sense contended for. This appears from the various Chinese Immigration Restriction Acts. Taking the existing one, ch. 8 of 1903, by section 6 it imposes an immigration tax of $500 on "Every person of Chinese origin, irrespective of allegiance." And the definition is:

"4 (*d*). The expression "Chinese immigrant" means any person of Chinese origin (including any person whose father was of Chinese origin) entering Canada and not entitled to the privilege of exemption provided for by section 6 of this Act."

And it was found necessary to exempt from the operation of the Act (*b*):

"(*b*) The children born in Canada of parents of Chinese origin who have left Canada for educational or other purposes, on substantiating their identity

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to the satisfaction of the controller at the port or place where they seek to enter on their return."

There is not even a reference here to a "native of the Chinese Empire or its dependencies" as there was in the B. C. statutes, and the sole test is a racial one, *i.e.*, that of origin and not of locality, nationality or allegiance. Nor am I without the highest authority in support of this racial view. I refer to the judgment of the Lords of the Privy Council in the case of the Japanese *Tomey Homma, supra*, wherein the words in question were:

"The expression 'Japanese' shall mean any native of the Japanese Empire or its dependencies not born of British parents, and shall include any person of the Japanese race naturalized or not."

And it was argued (p. 154) that it was "attempted to impose on naturalized aliens of the Japanese race, on the score of their alien origin alone, a perpetual exclusion from the electoral franchise" But the Lord Chancellor in delivering their Lordships' judgment, after pointing out (p. 155) that it was an enactment dealing with the exclusion of a particular "race," goes on to say, p. 156:—

"The first observation which arises is that the enactment, supposed to be *ultra vires* and to be impeached upon the ground of its dealing with alienage and naturalization, had not necessarily anything to do with either. A child of Japanese parentage born in Vancouver city is a natural-born subject of the King, and would be equally excluded from the possession of the franchise."

And he further pointed out that because there was a mere mention of the word "naturalized" in the definition, which had been seized upon to curtail the section and bring it within the scope of Federal authority, yet it would be an "absurdity" to hold that the law was thereby made *ultra vires*, for, he says, in language singularly applicable to the case at bar, "The truth is that the language of the section does not purport to deal with the consequences of either alienage or naturalization."

If therefore their Lordships had no difficulty in arriving at the conclusion that *Homma's Case* did not, under the language in question, depend upon nationality or one of its consequences and attributes, alienage, or a secondary consequence when the old nationality and alienage became changed into naturalization, which is a new nationality, still less should this Court have difficulty in arriving at a like conclusion when there is no mention of naturalization in what I have styled the "standard" definition of the word "Chinese" as employed by the Legislature.

I feel therefore that I am fully justified in proceeding on the assumption that the word is used in that sense, and that only.

In view of the pregnant suggestion of the Lord Chancellor above quoted, that there are Japanese in this Province who are not either aliens or naturalized persons, it becomes expedient to apply that suggestion to this case, because it involves consideration of a fact

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of much importance and of which the Court in its common knowledge of the people and affairs of this country will take judicial notice. It is, that there is a considerable and ever increasing third class of Chinese residents of this Province who are neither aliens nor naturalized persons, but natural-born British subjects, under the well known rule laid down in Dicey's Conflict of Laws (1896), 175:

"Rule 22.—Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British Dominions, is a natural-born British subject."

This third class is composed of the children or grand-children of Chinese parents domiciled here. It should be borne in mind, though often overlooked, that with the exception hereinafter mentioned, the first Chinese settlers who came to the then Colonies of Vancouver Island and British Columbia arrived at least as early as 1858. Their presence in British Columbia as placer gold miners on the Fraser River is first recorded by Governor Douglas in his despatch of August 19th, 1858, to the Secretary of State for the Colonies (Papers Relating to the Affairs of British Columbia, 1859, vol. 1, p. 27) and they had increased in numbers to such an extent that in his despatch of October 9th, 1860, the Governor incloses an address of the grand jury of Cayoosh (now Lillooet) to him which contains this statement—(Pt. iv., p. 27): "The grand jury desire to call your Excellency's attention more particularly to the great number of Chinamen now residing in and flocking to this Colony," etc., and that body asked that they receive protection as useful additions to the population. Historically, and as being the exception above mentioned, it may not be out of place to note that the first Chinese, some 70 in number, who came to what is now British Columbia, were brought to Nootka Sound from Canton so long ago as 1789, by Lieut. John Meares, R.N., and his associates who had embarked in the North-West coast fur trade. In that officer's memorial presented to the House of Commons on May 13th, 1790, he states that the two ships which arrived at Nootka in June and July, 1789,

"Had also on board, in addition to their crews, several artificers of different professions, and near 70 Chinese, who intended to become settlers on the American Coast in the service and under the protection of the Associated Company."

On the seizure of these British ships and property by the Spaniards, these Chinese were detained at Nootka, and, as Meares says, (p. 11) were compelled to enter the service of Spain, and (strangely coincidently) "were employed in the mines which had then been opened on the lands which your Memorialists had purchased." (And see the information of William Grubb accompanying the memorial.) They were shortly thereafter transported to Mexico by order of the Spanish Viceroy thereof (Authentic Statement relative to Nootka Sound, London, 1890, p. 15), so as a factor in the

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population of this Province they need not be further considered, and the year 1858 may be taken as that of their introduction to an appreciable extent.

According to the report of the Royal Commission on Chinese and Japanese Immigration, 1902, p. 7, there were in 1901, 16,792 Chinese in Canada, distributed as therein mentioned throughout the various provinces of Canada; but the great majority of them, 14,376, reside in this Province. Quebec comes next with 1,044, and Ontario 712. In this city, Victoria, the number was then 2,715. These people have considerably increased during the last two years; and in case of their younger children the providing of suitable accommodation for them in the public schools has become, in Victoria at least, a public question of concern requiring special consideration by the educational authorities.

I have been careful to go into these facts because heretofore they have been overlooked, and it is essential that there should be no further misapprehension about the true situation, for unless it is correctly presented to the Court decisions based on partial and insufficient facts can have no real application.

Now it must be admitted that as regards these Chinese who are natural-born British subjects, the children or grand-children of the Chinese pioneers, the enactment in question cannot be successfully impeached, and so far at least must be held to be *intra vires*.

Seeing then that the facts established are (1) that there does exist a third class of Chinese in this Province who are natural-born British subjects to whom the principles of the decisions respecting aliens and naturalized persons have no application; and (2) that the Legislature deals and intends to deal with Chinese as a race only, what is there that prevents this Court from advising His Honour the Lieutenant-Governor in Council that the enactment in question is *intra vires?* The answer is nothing, unless it be the judgment of the Privy Council in *Bryden's Case.* In considering that case, it is of the first importance that the following rule on the construction and application of a judicial decision be borne in mind. I refer to *Quinn* v. *Leatham* (1901), A. C. 495, wherein the Lord Chancellor says, in the House of Lords:

"Now, before discussing the case of *Allen* v. *Flood* in this House, and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reason-

ing assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. My Lords, I think the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision of the case of *Allen* v. *Flood*."

It was this principle that the Lord Chancellor doubtless had in mind when in distinguishing *Tomey Homma's Case* from that of the *Union Colliery Co.* v. *Bryden*, he said, referring to the fact that this Court thought it understood and was following *Bryden's Case*, that

"This, indeed, seems to have been the opinion of the learned Judges below; but they were under the impression that they were precluded from acting on their own judgment by the decision of this Board in the case of *Union Colliery Co.* v. *Bryden*. That case depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia, and, in effect, to prohibit their continued residence in that Province, since it prohibited their earning their living in that Province."

By the words "naturalized or not" it is clear from the whole context that His Lordship had reference to naturalized Chinese or alien Chinese.

Seeing, therefore, that the decision in *Bryden's Case* must be restricted to "the particular facts" thereof, it is essential to bear in mind exactly what the facts were upon which that decision was given.

On turning to the report, it appears that when the appeal came before the Privy Council it was presented to their Lordships on the assumption that there were only two classes of Chinese in this Province who were affected by the legislation in question, that is to say, aliens and naturalized persons. That the whole case turns on that point, and that only, plainly appears by a perusal of the argument of counsel, as well as the judgment of their Lordships. Counsel for the appellant took the ground that it was an attempt to restrict the settlement of Chinese aliens in British Columbia, which it was argued, was a violation of the spirit of treaties, was opposed to the comity of nations, was calculated to create complications between the British and Chinese Governments, and conflict with the exclusive authority of the Dominion Parliament. Strangely enough, the counsel representing this Province, as intervenant, never, according to the report, intimated that there was a third class which might be affected, suggesting only that naturalized persons, as well as aliens, might come within the scope of the enactment. At p. 582, the argument on this point appears as follows:

"But Chinamen are not necessarily aliens. The term Chinese or Chinaman is one which is perfectly well understood in Canadian legislation, and means persons of Chinese habits and origin. It may include aliens within its meaning; but most of the Chinese who are affected by this legislation have been naturalized."

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It is remarkable that there is not a word here, nor in the judgment, about natural-born Chinese subjects of the Crown apart from naturalization, and the fact of their existence had evidently never been suspected by counsel or they would not have failed to have drawn their Lordships' attention to it. This is strikingly brought out by the language of Lord Watson, p. 587, as follows:

> "But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia.
>
> "Their Lordships see no reason to doubt that, by virtue of s. 91, sub-sec. 25, the Legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the Provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada."

The foregoing extracts shew clearly that while the decision must be taken as the law on the incomplete facts as presented to their Lordships, yet, as pointed out by the Lord Chancellor in *Tomey Homma's Case*, it can have no application to the present case where an additional fact of the first and last importance is now made to clearly appear, that is, the existence of the said third class of Chinese residents of this Province in regard to whom the power of the Legislature is not doubted, and to that class the enactment can have and does have full application. A leading result of *Homma's Case* is that if one class of a race so affected is beyond the scope of the Federal power because not partaking of alienage or naturalization, then legislation affecting it is within the scope of the provincial authority in "Local Works and Undertakings," or "Civil Rights," and in so dealing with a race over which it has authority the impeached enactment is not invalidated because it affects other classes of the same race over which it has not authority, provided it applies to them all alike, places them on the same footing, and does not discriminate between them. This is apparent from the Federal Naturalization Act itself (R. S. C. ch. 113) for sec. 15, while providing that an alien who has been naturalized shall have within Canada "all political and other rights, powers and privileges" of a natural-born British subject, at the same time declares that he "shall be subject to all obligations" to which such natural-born person is subject. No naturalized Chinaman, and much less an alien, can therefore have greater rights in British Columbia than one who is a natural-born British subject.

Then there is that other fact, already set out, of scarcely secondary importance, which also serves to distinguish this case from *Bryden's*,

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i.e., that the Legislature uses the word "Chinese" in the broad racial and descriptive sense hereinbefore defined. In fact this case, as now properly understood, has arrived at the stage which was foreseen by the Lord Chancellor when he pointed out in *Tomey Homma's Case* that this question of the rights of Japanese (and consequently Chinese) did not necessarily depend upon alienage and naturalization at all, and that the introduction of a third element, *i.e.*, the natural-born subject, gave the case a widely different complexion.

On the whole matter, therefore, the conclusion I have come to, after a very careful, and, I may say, almost anxious consideration, is that on the particular facts the present case is as clearly distinguishable from *Bryden's Case* as was *Tomey Homma's;* to hold otherwise would result in the conclusion that the rights of the natural-born subjects of the King in British Columbia are less than those of aliens or naturalized Chinese. Such a result is not only directly in the teeth of the Naturalization Act, but is so repugnant to common sense and natural justice that I could not force myself to accept it unless I was compelled to do so by the clearest judicial precedent.

In the foregoing necessarily full expression of my opinion, I am fortified and encouraged by the remarks of the Lord Chancellor in *Tomey Homma's Case* above quoted, who, in effect, pointed out that this Court had surrendered its own judgment in the fancied following of what it believed to be their Lordships' decision in *Bryden's Case,* without appreciating the essential distinction created by the difference in the facts. This, I cannot now help feeling, was unfortunate, because in questions of such gravity it seems most desirable that all the salient local circumstances and facts should be brought forward and fully considered (and particularly so in the case at bar, because no counsel has appeared in opposition to those representing the Crown), to the end that should the matter go higher, every circumstance this time will be fully submitted to the appellate tribunal which would be likely to be of assistance to it, whereby the danger of further misapprehension of the real state of affairs in this Province may be avoided.

Finally, and in formal answer to the question submitted to us, and on the particular facts, I do, pursuant to section 12 of the Supreme Court Act, 1904, certify to His Honour the Lieutenant-Governor in Council that in my opinion said rule 34 should be regarded as essentially a regulation for the working of coal mines, and therefore is within the powers of the Legislature of British Columbia.

Question answered in the negative.

NOTE.—Leave to appeal was granted by the Privy Council on December 10, 1904. In Appendix A will be found a report of the proceedings.

See *Attorney-General* v. *Wellington Colliery Co.*, *ante*, p. 70.

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In *Rex* v. *Priest*, on an application to quash a conviction, the same point had already come up before DRAKE, J., who on 18th January, 1904, gave judgment as follows:

The defendant was convicted of employing below ground a Chinaman named Wing Shine, contrary to Rule 34 of section 2 of ch. 17, 1903. The rule is not easy to construe. What it is intended to mean is, in effect, that no Chinaman, or person unable to speak English, shall occupy a position of trust in a mine whereby he might endanger the life of a person employed about a mine, as banksman, etc., or be employed below ground or at a windlass of a sinking-pit. In other words, he is not to be appointed to a position where he will endanger certain specified individuals, nor is he to be engaged below ground. The reason for this rule is not obvious. A person working below ground in ordinary manual labour can hardly be said to endanger the life or limb of any of the designated persons. It is a clause to exclude all persons, whether British subjects or not, who cannot speak English, from earning their living by working in a coal mine; in other words, it is directed against aliens.

The question appears to be limited to this: is this regulation one which falls within the purview of section 93 of the B.N.A. Act, or does it belong exclusively to the class of subjects assigned to the Dominion Legislature by section 92? The question has already been ventilated in the Privy Council.

In *Union Colliery* v. *Bryden* (1899), A. C. 580, Lord Watson says, that there is no doubt that if section 92 of the B. N. A. Act stood alone, not qualified by the provisions of the clause which precedes it, the Legislature of British Columbia would have ample power under section 4 of the Coal Mines Regulation Act, and also under sub-sections 10 and 13 of section 92 of the B. N. A. Act dealing with property and civil rights; but section 91, sub-section 25, extends the exclusive legislative authority of the Parliament of Canada to naturalization and aliens, and concludes with a proviso that any matter coming within the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes assigned exclusively to the Legislatures of the Provinces, and the Privy Council found that the provisions of section 4 of the B. C. Coal Mines Act, 1897, were *ultra vires* the B. C. Legislature.

The Legislature has amended the section which was declared ultra vires, and has included Chinamen and all persons unable to speak English, thus including a large class of aliens; hoping thus to obviate the effect of the Privy Council's judgment. It is reasonable to suppose that the people unable to speak English are aliens, or at all events that the Legislature aimed at these persons, although there are many, both Canadian and native-born English subjects, who cannot speak English, to which the test of language is equally applicable. If these persons are aliens, the case is governed by the *Union Colliery Co.* v. *Bryden*, above quoted. If they are British subjects, it affects trade and commerce. Under sub-section 2 of section 91 of the B. N. A. Act, freedom to trade with Canada includes freedom to engage in occupations in Canada for the purpose of earning a livelihood. Although the Province may make laws relating to property and civil rights, I do not think the latter can be treated as enabling the Legislature to exclude a large number of persons from earning a living in the manner they were brought up to. If the Legislature can prevent the employment below ground, they can equally do so above, and this would be an interference with trade and commerce, and not within the Provincial powers.

I think the rule should be made absolute.

Cassidy, K.C., appeared in support of the application, and *Maclean*, *D. A.-G.*, *contra*.

1904.
February 12.

HUNTER, C.J.

IN RE WATER CLAUSES CONSOLIDATION ACT AND ROSSLAND POWER CO., LTD.

(10 B. C. 356.)

Water Clauses Consolidation Act, secs. 22, 27, 85, 87 and 89—Power Company—Consolidation of Records—Alteration of Points of Diversion—Effect of Certificate of Lieutenant-Governor-in-Council.

Where a company holds distinct water records acquired from different owners they cannot be consolidated.

Where a power company has obtained a certificate from the Lieutenant-Governor in Council approving its specified purposes, one of which is to alter the point of diversion of its water, it is entitled to have its water record amended, without the imposition of terms, to cover the alteration.

Statement.

IN September, 1903, the Rossland Power Company, Limited, purchased certain water records held by the War Eagle Consolidated Mining and Development Company, Limited, and certain other water records held by the Centre Star Mining Company, Limited, for water from the three upper forks of Murphy Creek, the points of diversion being at six different points.

In October, 1903, the Power Company filed the various documents specified in section 85 and proposed among other things to alter said points of diversion and fix them at a single point lower down the main stream of Murphy Creek.

On November 5th, the Lieutenant-Governor in Council approved of the undertaking, and a certificate was issued to the Power Company accordingly.

On November 16th, 1903, the Power Company applied to the Commissioner at Nelson to consolidate the said records and to alter the points of diversion as aforesaid. On December 3rd, the Commissioner refused the application on the ground that the Water Clauses Consolidation Act, 1897, did not authorize a consolidation of records in such a case, and that before the points of diversion could be altered a fresh application, by posting notices, etc., would be necessary.

The Power Company appealed, and the appeal was heard before HUNTER, C.J., at Nelson, on 12th February, 1904.

Argument.

Galt, for the appellants.

John Elliot, for the respondents.

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February 12.

HUNTER, C.J.

Per CURIAM:—The Act does not appear to provide for the consolidation of the records in the mode requested; but the appellants are clearly entitled, under section 89, to have their records amended by altering the points of diversion in the manner applied for.

Section 27 cannot be invoked to impose terms upon a Power Company whose purposes included an alteration of the points of diversion, when those purposes were approved by the Lieutenant-Governor in Council, and when a certificate to that effect had issued.

Judgment accordingly.

NOTE.—For other water cases: see *In re Water Clauses Act*: *Centre Star Ming. Co.* v. *City of Rossland*, *ante*, p. 27; *Ross* v. *Thompson*, *ante*, p. 79; *Byron N. White Co.* v. *Nandon Water Works Co.*, *post*, p. 240; *Brown* v. *Spruce Creek Power Co., Ltd.*, *post*, p. 254.

DUMAS GOLD MINES, LTD. v. BOULTBEE ET AL.

1904.
March 18.

MARTIN, J.

(10 B. C. 511.)

Mineral Claim—Transfer of—Time for Recording—Mineral Act, secs. 19, 49 and 50—Interpleader Issue—Execution vs. Bill of Sale.

The time for recording mineral claims depends not upon the distance of the locator, but of the claim itself from the Mining Recorder's office, and a transferee, wherever residing, of a location has no longer time to record his transfer than the locator had to record the claim. Consequently, a bill of sale not so recorded is of no effect against an intervening execution against the transferor's interest.

Statement.

INTERPLEADER issue tried before MARTIN, J., at Rossland on 15th and 16th March, 1904, the question to be determined being "does the defendants' execution against Gilbert Pellent prevail against the claim of the plaintiff company or of its predecessor in title E. M. Pellent," to the undivided half interest of the said Gilbert Pellent in the mineral claims mentioned in the issue.

J. A. Macdonald and *Galt*, for plaintiffs.

Hamilton, for defendants.

Cur. adv. vult.

18th March, 1904.

Judgment.

MARTIN, J.:—According to the issue as amended pursuant to the principle laid down in *Bryce* v. *Kinnee* (1892), 14 P. R. 509, the question to be determined is, does the defendant's execution against Gilbert Pellent prevail against the claim of the plaintiff company "or of its predecessor in title, E. M. Pellent," to the undivided half interest of the said Gilbert Pellent in the mineral claims mentioned in the issue?

The chain of the title set up by the company is through a bill of sale (for the consideration of $500) from said Gilbert Pellent of his half interest to E. M. Pellent, the company's predecessor in title, dated 23rd of February, 1903, and it is admitted that this document was not recorded till the 22nd of May, 1903, and that in the meantime the sheriff had seized under the defendants' execution on the 18th of May, 1903.

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Gilbert Pellent was in the Yukon Territory, at Dawson, at the time, over two thousand miles from the Mining Recorder's office having jurisdiction over the claims in question, and it is contended that by the operation of sections 19 and 49 he or his transferees had some 215 days within which to record the instrument, on the assumption that, like a locator, one who wishes to record an instrument should be allowed one day for every ten miles of distance he who executes it may happen at the time to be from the Recorder's office. This is an ingenious but clearly fallacious argument. Section 49 says that conveyances, etc., "shall be recorded within the time prescribed for recording mineral claims," and that prescribed time is fixed by section 19 as dependent upon the distance from the claim to the Recorder's office, not of the locator himself therefrom. It is a fixed geographical and not a shifting personal distance that is contemplated by the statute, and it would be unreasonable to hold that the transferee of a bill of sale of a mineral claim would have more time to record that instrument than the free miner would have originally had to record the claim itself.

Such being the case, the bill of sale relied upon has not been duly recorded and is of none effect as against the defendants' intervening execution.

It is admitted by Croteau, an unreliable witness, that the company had actual notice of the seizure before it took the bill of sale of May 26th, 1903, from E. M. Pellent; and in any event I cannot see how it is aided by that document. I further find, if it is material, that Croteau knew of the judgment recovered in Vancouver setting aside said bill of sale from Gilbert to E. M. Pellent before he recorded that bill of sale.

Other points were raised, but it seems unnecessary to go into them. I find that the plaintiff company has failed to establish its title, and the issue is hereby determined in favour of the defendants.

Judgment for defendants.

NOTE.— As to recording instruments generally: see *Grutchfield* v. *Harbottle* (1900), 1 M. M. C. 396, and cases there noted.

R. v. TANGHE.

1904.
April 2.

DUFF, J.

Placer Mining Act—Gold Commissioner—"Lawful Order"—Conviction—Jurisdiction—Penalty.

A conviction under sec. 144 of the Placer Mining Act for refusing to obey a lawful order of the Gold Commissioner cannot stand if the order be in excess of jurisdiction.

Statement

CERTIORARI.—The prisoner, Edward Tanghe (who had been subsequently released on bail), was, at Trout Lake, in the County of Kootenay, on the fifth day of November, 1903, convicted and sentenced to three months' imprisonment with hard labour under sec. 144 of the Placer Mining Act, by two Justices of the Peace for the County of Kootenay, for that he

"did on the 24th day of October, 1903, refuse to obey a lawful order of the Gold Commissioner, Fred. Fraser, given in writing to remove the posts marking the eastern boundary of the Shamrock Placer Claim to a point whereby the workings of the Lucky Jack Mineral Claim is not endangered."

The order above mentioned purported to be given under sec. 128 of the Placer Mining Act, and is as follows:

MINING RECORDER'S OFFICE,
Kaslo, B.C., October 24th, 1903.

"*E. Tanghe, Esq.,*
Poplar Creek, B.C.

Re "Shamrock Placer Claim."

Dear Sir,—In confirmation of my conversation of this morning and acting under authority of section 128, sub-section (*g*) of the Placer Mining Act, I do now order the posts, marking the easterly boundary line of the above claim, to be moved so as to mark out the westerly boundary line of said claim leaving the now west boundary, the east line of said Shamrock Placer Claim.

I might here state for your information that during the visit over this claim in company with Messrs. Morgan, Simpson and yourself, it became so apparent that, of the annoyance and interruptions that the "Lucky Jack" M. C. owners must undergo owing to the Shamrock Placer Claim crossing their lead and overhanging the Big Showing, as must cause a constant source of danger to the mineral claim employees to such an extent that I have not the slightest hesitation in following up my powers and duties as Gold Commissioner in that protection due the quartz owner from the annoyance of the Placer man under the circumstances of the present case.

Obediently yours,
FRED. FRASER,
Gold Commissioner."

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DUFF, J

C. C. McCaul, K.C., for the motion, referred to the judgment of MARTIN, J., in the case of *Tanghe* v. *Morgan*, delivered since the conviction, wherein it had been decided, on April 2nd instant, that the order on which the conviction was founded was null and void.

Pottenger, for the Crown, stated he had just been made aware of the decision.

Judgment.

DUFF, J.:—The decision in *Tanghe* v. *Morgan* shows that the order now relied upon is not a lawful one on the facts as proved at the trial, and if the facts disclosed in the depositions herein (which I shall read) support the learned Judge's conclusion in that case, the conviction will be quashed. An inferior tribunal cannot confer upon itself jurisdiction by an erroneous decision of law: *Re Anderson and Long Point Co.* (1890), 19 Ont. 493.

Having referred to the depositions the learned Judge subsequently stated that the facts were such that the order was unlawful, and indeed it appeared so on the face of it.

Conviction quashed.

NOTE.—For the decision in *Tanghe* v. *Morgan*: see *post*, p. 178.

SABIN v. PINE CREEK POWER CO., LTD., ET AL.

1904
April 28.

FULL COURT.

Placer Miner—Free Miner—Co-Owner—Partnership—Evidence.

Where co-partners are working placer claims together it takes very little evidence to shew that they have become co-partners as well as co-owners. Decision of HENDERSON, Co.J., affirmed on this point.

Statement.

APPEAL by defendant from a judgment of HENDERSON, Co.J., delivered on October 5th, 1903, in an action tried at Atlin in the mining jurisdiction of the County Court, on September 1, 2, 3, 4, 5, 6 and 8, respecting certain placer mining operations in the years 1901, 1902 and 1903, on Pine Creek.

The case is reported only on the point of a mining partnership which His Honour found existed between the plaintiff and defendant Blunck.

The appeal came on for hearing at Vancouver before the Full Court, consisting of HUNTER, C.J., MARTIN and DUFF, JJ., on 28th April, 1904.

Argument.

J. D. Taylor, for the appellant: The operations began in 1901 between three co-owners, Scott, Harrigan and the plaintiff; and it is for the defendants who allege it to prove that these co-owners became partners, and the evidence here does not justify such finding. (The learned counsel here reviews the evidence.)

A. L. Belyea, K.C., for the respondent: The three placer claims in question were grouped together for the purpose of working them by leave of the Gold Commissioner, and the evidence shews that whatever these parties may have been at the beginning of their relation, the status of co-owners as between Sabin and Blunck was altered to that of co-partners as well as co-owners at the time of the matters complained of.

Judgment.

Per CURIAM:—The learned Judge was right in finding that there was a co-partnership between these two persons to work these claims. It takes very little for working co-owners to drift into the position of co-partners.

Appeal dismissed on this point.

NOTE.—For other cases on mining partnerships: see *Wells* v. *Petty* (1897) 1 M. M. C. 147; *Gray* v. *McCallum* (1897), *Ib.* 206; *McNerhanie* v. *Archibald* (1899), *Ib.* 320; *Alexander* v. *Heath* (1899), *Ib.* 333; *Marino* v. *Sproat* (1902), *Ib.* 481.

1904.
May 25.

HANNA v. MORGAN ET AL.

FULL COURT. *Practice—Trial—Postponement of—Terms — Costs—Pleading—Amendment — Hearing of Motion and Summons during Sittings of Court.*

Pleadings in mining cases should be certain and unambiguous, and if it is intended to attack a location on the ground of non-compliance with the Mineral Acts it must be specifically pleaded.

Terms upon which an amendment at the trial will be granted, considered.

Applications relating to records entered for trial should on and after the Commission day of Assize or first day of Civil Sittings be made to the Court and not in Chambers.

Statement. ADVERSE action entered for trial at the Nelson Spring Assizes before Mr. Justice MARTIN, between the Poplar and the Lucky Jack and Lucky Three mineral claims.

Motion by defendants to amend par. (9) of their statement of defence by a sub-paragraph alleging that the No. 1 post of the Poplar mineral claim was placed within the limits of the Little Phil mineral claim then being an existing valid location.

Sub-paragraphs (*a*) and (*b*) of par. 9 were as follows:—

(*a*) The said Poplar Mineral Claim was not located upon waste lands of the Crown.

(*b*) The alleged Poplar Mineral Claim was located upon lands then lawfully occupied, and was within the limits of mineral claims previously located, and then in existence as good valid subsisting mineral claims, namely, the Lucky Jack and Lucky Three Mineral Claims.

The pleadings were closed on January 6, 1904, and notice of trial shortly thereafter given for the Spring Assizes at Nelson, and the record duly entered for the commission day thereof, viz.: May 17th. The civil list was reached on May 21st. On the 13th inst. a chamber summons had been taken out asking for a jury as well as for the amendment, which on the 16th came on for hearing before the learned local Judge, FORIN, Co.J., who made an order for a jury and enlarged the matter of the amendment for one week, the 23rd. On the 21st the matter was mentioned in Court to the presiding Judge by

Argument. *W. A. Macdonald*, K.C., for the defendants.

McAnn, K.C., for the plaintiff.

Judgment. *Per* CURIAM:—On and after the commission day of the assize, or the first day of a civil sittings, as the case may be, all applications in regard to the disposition of the records then entered for trial should be made in Court to the presiding Judge of Assize or Sittings, and not in Chambers, for he alone during the sittings of the Court has control over the cause list. If this matter could not have been disposed of in Chambers before the commission day, the 17th, it should have been brought up in Court on motion at the earliest

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opportunity, pursuant to a ruling in that behalf which, after full argument on the point, I gave here in *Felt* v. *Dickinson* at the Spring Assizes of 1902, and have since followed. Any other course is irregular and leads to confusion. In the circumstances, however, you may, Mr. *Macdonald*, serve short notice of motion for Monday morning.

Motion to amend.

On Monday the 23rd, pursuant to such leave, *Macdonald*, K.C., moved to amend as aforesaid.

Argument.

McAnn:—For nearly three months the defendants have had notice of trial and every opportunity to prepare their defence in the fullest manner. They have long known of this alleged defect, which they now at the last moment try to set up, and it is a serious and embarrassing attack which I could not afford to ignore, and if the amendment is granted I must ask for a postponement to enable me to meet it, and also for the costs occasioned thereby, because the plaintiff has been for days; and is now here with his witnesses ready to proceed with his case when called, as it may be in a few hours.

Macdonald:—It is true that for some considerable time we have known of the position of this No. 1 post, but I submit the point is really raised in par. 9 (a) and I ask for the amendment as a matter of caution.

McAnn:—The point is not distinctly raised, as it should be in mining cases particularly; the pleading is ambiguous and uncertain, and as framed is misleading as to its real object, and has, in fact, misled us.

Judgment.

Per CURIAM:—It is rather a difficult thing to say whether or no the point now raised by the amendment sought to be made is already covered by sub-par. (*a*), and if that paragraph stood alone it might possibly be wide enough, though bearing in mind rules 158, 169, and *Hogg* v. *Farrell* (1895), 1 M. M. C. 79, and cases mentioned in the note (p. 83), *q. v.*, and the special desirability in mining cases that the opposite party should not be taken by surprise (rule 169), owing to the frequently technical nature of the issues and the rapidity with which the complexion of the case may be changed and the ground of attack or defence shifted, and the difficulty of obtaining witnesses from such a shifting and wandering class as prospectors and free miners generally, I should probably arrive at a contrary conclusion if it were necessary to decide the question on that bare point. But in the present case the next sub-par. (*b*) does in unmistakable language set up as against two other claims the exact objection now sought to be advanced against the Little Phil, thus:—(reads par. as *supra*).

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Reading then these two objections set up in (*a*) and (*b*) I have no hesitation in saying as the result of my experience that I should not myself conclude therefrom, were I plaintiff's counsel, that it was attempted to attack the Poplar on the present point. On the contrary, because the language used is so different and may be applicable to other objections, and also because (*b*) includes the two claims specially named therein, the fair inference would be that it was intended to exclude any or all claims not mentioned therein. If the real intention were to attack the initial post of the Poplar it is unfortunate that the pleader did not say so in that clear and unambiguous language which the Court will expect in such circumstances. The pleader should have experienced no more difficulty in expressing himself in regard to the Little Phil than he did in regard to the other two claims, *i.e.*, the Lucky Jack and Lucky Three. Where pleadings are ambiguous they will be construed against the pleader—Stephen on Pleading (1866), 337; Odgers on Pleading, 4th ed., 72. The amendment, therefore, is necessary in the circumstances to raise the objection, and as the plaintiff has been surprised, the question of what terms should be imposed at this late stage only remains to be settled.

McAnn:—I am totally unprepared to meet such a grave issue now and must have time to investigate this new ground of attack and prepare my case, and if need be summon additional witnesses; this will take some time and cannot be done now, so there must be a postponement till next assizes, and I ask for costs of and consequent upon the amendment payable forthwith and costs of the day likewise payable.

Macdonald:—The costs should not be payable forthwith, or at least those relating to the amendment, which as a matter of principle are distinct, though the difference in amount is small.

Per CURIAM:—At this stage the terms of the amendment will be (1) postponement of the trial, and (2) the payment of the costs of the day, which will be payable forthwith as usual, and as has already been ordered in a prior case on this cause list; the costs of and occasioned by the amendment of the pleadings will be in the cause to the plaintiff in any event.

Order accordingly.

Macdonald asked for and obtained two days' time to consider the terms, and his action thereon, and on the 25th stated that he preferred to proceed to trial without the amendment rather than have a postponement, and so the motion was dismissed.

NOTE.—As to postponement and terms: see also *Noble Five Consol. Ming. etc., Co.* v. *Last Chance Ming. Co., Ltd.*, *ante*, p. 35; and *Tanghe* v. *Morgan*, *post*, p. 178.

LEADBEATER ET AL. v. CROW'S NEST PASS COAL CO.

1904.
June 30.

MARTIN, J.

Coal Mine — Miners' Meeting—Miners' Union—Notice of Meeting—Report of —Evidence—Safety Lamp—Negligence—Coal Mines Regulation Act—Gas or Dust Explosion.

A report of a committee appointed by a meeting of a Miners' Union to inspect a mine is not nor is it equivalent to the report of a committee appointed by "the persons employed in a mine" to make such inspection under Rule 31, even though a majority of such persons may be members of that Union.

A statutory meeting of such employees may be called by due notice posted at the pit's mouth.

The bonneted clanny lamp is a locked safety lamp within the meaning of Rule 8.

Held, on the facts, that the explosion in question was a gas and not a dust explosion.

Statement.

TRIAL at the Nelson Spring Assizes, before MARTIN, J., of five consolidated test actions of ninety-one actions by various plaintiffs brought against the defendant company arising out of an explosion at its Coal Creek mines, near Fernie, on May 23rd, 1902, whereby some 125 workmen were killed. The trial lasted from May 31st to June 22nd, inclusive.

Argument.

S. S. Taylor, K.C., *O'Shea* and *W. R. Ross*, for the various plaintiffs.

Joseph Martin, K.C., *Davis*, K.C., *Bodwell*, K.C., and *W. A. Macdonald*, K.C., for the defendant company.

The case is reported only on the two points of (1) the use of a locked safety lamp under rule 8 of the Coal Mines Regulation Act, and (2) of an alleged miners' meeting* under rule 31.

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* Rule 31. The persons employed in a mine may from time to time appoint one or two of their number to inspect the mine at their own cost, and the persons so appointed shall be allowed, once or oftener in every shift, day, week, or month, accompanied, if the owner, agent, or manager of the mine thinks fit, by himself or one or more officers of the mine, to go to every part of the mine, and to inspect the shafts, levels, planes, working places, return air-ways, ventilating apparatus, old workings and machinery, and shall be afforded by the owner, agent, and manager, and all persons in the mine, every facility for the purpose of such inspection, and shall make a true report of the result of such inspection, and such report shall be recorded in a book to be kept at the mine for the purpose, and shall be signed by the persons who made the same. And if the report state the existence or apprehended existence of any danger, the owner, agent, or manager shall forthwith cause a true copy of the report to be sent to the Inspector of the district.

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In regard to the first point.—During the course of the trial on 16th June, *Davis,* K.C., tendered in evidence the written and signed report of a committee of two miners, Addison and Stevens,. appointed by an alleged meeting of "the persons employed in the mine" under rule 31. It had been proved that an indefinite majority of those employed in the mine were members of the Western Federation of Miners, Fernie Branch, No. 76, Gladstone Union; that the appointment of the committee had been made by a regularly called meeting of that union; that the plaintiff Leadbeater was a member of that union; that such meeting purported to act under said rule; that the committee was allowed by the management to make the inspection; that the report was recorded in the book kept in the mine for that purpose; that other persons in no way connected with the mine were members of the union; that the union included in its members certain persons who had never been employed in a mine at Coal Creek or elsewhere, but who nevertheless, as one witness described it, "attempted to dictate" to the employees in the mine in question what they should do.

Argument.

Davis, K.C.:—I submit the report should be admitted as evidence. The majority of the persons employed were members of the union, and they purported to act under the rule. No other committee acted in the matter, and the meeting represented those who were engaged in the mine. Suppose only six men in the mine would wish to have such a committee and the others took no action, it would not be argued that these six would not be entitled to the protection of the statute. Nor does it seem to me necessary that in order for these six to become a committee some public or general notice is required by which all the miners, even if they did not wish to take part, would have notice at any rate and be able to take part if they wished. If that were the intention I presume there would be a provision in the statute that if a certain notice were posted up, &c., but as there is no statutory limitation I submit that any number of the miners who got together as here at a regular meeting, whether large or small makes no difference, and decided to appoint a committee to examine that mine, whether they happened to meet in the hall of the Gladstone Miners' Union or elsewhere is immaterial, they, I submit, became a committee appointed under and pursuant to the provisions of the statute, and when they have been recognized by the management as such, as they must be and were here, and they make a report on the mine, that becomes a report under the statute.

S. S. Taylor, K.C.:—This was clearly not a statutory meeting, but merely the voluntary act of an organization, the union, which not only did not include all those employed in the mine but did include an indefinite number of outsiders who had never been employed in a mine at all.

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Per CURIAM:—The contention that, under rule 31 of the Coal Mines Regulation Act, which says that "the persons employed in a mine" may do certain things, such an organization as a Miners' Union, whose status is not recognized by the statute, may supplant the general body of employees and arrogate to itself their rights and powers, is untenable.

If all the persons so employed in a mine were called and given reasonable opportunity to attend a meeting in the time-honoured way—similar meetings have been held hundreds of years before there were such things as Miners' Unions—*i.e.*, by notice to all concerned posted at the pit's mouth, the proper place primarily and historically to post such a notice, a meeting so called would be truly representative of those employed in the mine and fairly accomplish the object of the rule. But if the notice presumes to summon said persons to attend a Miners' Union meeting, then the result is very different, for it is a matter of common notoriety that those bodies do not usually include all those employed in the occupations they claim to represent. Such, indeed, is the established fact in this case, for there has been a witness in the box, and an employee in this mine, who said he did not belong to this Union, To hold that a Miners' Union meeting was a statutory meeting would mean that those workmen who did not wish to belong to a Miners' Union or attend its meetings must either do so or lose their statutory rights, and the result would, for example, be that assuming there were one hundred people working in a mine and sixty of them posed as a Miners' Union, these sixty would supplant the other employees, rule the mine, and seize for themselves all the statutory rights and privileges of their fellow workmen.

The meeting in question was not a statutory one, and the report made thereunder is rejected.

Report excluded.

In regard to the safety lamp, it was alleged that the company was negligent in that the kind of lamp used in its mine, the bonneted clanny, was not a "locked safety lamp" within the meaning of rule 8, which provides that

> In every working approaching any place where there is likely to be an accumulation of explosive gas, no lamp or light other than a locked safety lamp shall be allowed or used.

The rule contains no definition of the term "locked safety lamp." Evidence pro and con was given as to the particular lamp used answering that description.

Cur. adv. vult.

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MARTIN.

30th June, 1904.

MARTIN, J.:—During the consolidated trial of these five test actions, evidence was given in support of two charges of negligence, viz.:

(1) The use of a bonneted clanny lamp, which it was contended was defective, and not a "locked safety lamp" within the meaning of the Act; and

(2) The accumulation of dust to a dangerous extent.

In regard to the first it is sufficient to say that it was clearly established that the type of lamp so used, while not perfect (which, indeed, no existing safety lamp in reality is), yet is in very general use, and reasonably fulfils the statutory requirements. This was, in fact, practically conceded on the argument.

In support of the second charge the plaintiffs advance the theory that the explosion was essentially one of coal dust; while in answer to that the defendant company maintains that it was a gas explosion substantially and essentially, though admitting that, as in every explosion in a mine of this nature, dust may have participated in it to an immaterial and unascertainable extent.

In support of these conflicting theories a great body of evidence was adduced in a trial lasting more than three consecutive weeks, and even if it were desirable for me to do so when discharging the functions of a jury on pure questions of fact (and I do not think it is), it would be almost an impossibility to attempt to review in detail all the evidence which I have listened to and weighed in a trial of such duration and complexity of fact, though not of issue. Dealing with such explosions as this, it is manifest that there is much that must remain a mystery, for no witness has been bold enough to claim to thoroughly understand the forces of nature or their varying operation when disturbed by man in such undertakings as those under consideration, or give other than a speculative account of the cause of ignition, or even fix upon the precise locality of the explosion's origin. But approximately I have no reasonable doubt that some unascertained point in Macdonald's level must be taken to be the place of such origin.

The next fact to be determined is, was it a gas or a dust explosion? In arriving at a conclusion on this vital point, wherein science plays so great a part, the Court is very largely in the hands of experts, and, in determining what weight shall be attached to their testimony, will be guided by their apparent competency and disinterestedness. Applying, then, the opinions of these witnesses to requisite facts, which have been proved to my satisfaction, I am forced to the conclusion that on the evidence it must be held that this was

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essentially and substantially a gas explosion, and one of such a nature and extent that, quite apart from any possible augmentation by dust it was alone sufficient to cause, and consequently must be held to have caused, all the results which the plaintiffs necessarily assumed the onus of attributing to a dust explosion. In this relation I think it proper to say that I accept as substantially correct the defendant's contention as regards two facts of paramount importance: viz., (*a*) the state of affairs at the overcast; and (*b*) in the main entry generally; and largely as a consequence thereof I am satisfied that the explosion properly so-called did not pass through that main entry; though if the dust theory be accepted that is the place of all others throughout the length of which it must have passed in the condition of that mine. There is nothing, in my opinion, in the conclusions of the Coal Dust Committee (Second Report, 1894, p. viii.), which, having regard to the circumstances of this case, conflicts with this view; though it is apparent that there is still much to be learned on the interesting and important subject of dust in coal mines.

Such being the opinion I have arrived at, it is not necessary to consider any other matters, which become immaterial, nor to refer to the cases cited, because on the above facts so found no negligence can be attributed to the defendant company.

It follows that the test actions must be dismissed with costs.

It is due to the plaintiffs' leading counsel, Mr. Taylor, to say that the manner in which he conducted an exceptionally long and difficult case merits the commendation of the Court.

Action dismissed with costs.

NOTE.—The additional rule 8*a* of the Coal Mines Regulation Act Further Amendment Act, 1904, now provides for the testing of safety lamps.

"Rule 8*a*.—In addition to the requirements of Rule 8, every safety lamp so in use shall be tested in an explosive mixture of gas and air at least once every week, and should the glass, washers, gauze or any of the essential parts of such lamp have been renewed or removed and replaced after a lamp has been so tested, then such lamp shall be again tested; and any lamp which shall be shewn by such test to be imperfect or inefficient shall not be allowed in any mine to which this Act applies, until such imperfection or inefficiency shall have been remedied and the lamp shall have passed a satisfactory test. And every colliery so using safety lamps shall be equipped with apparatus for making such tests of some such form as shall be approved of by the Minister of Mines, and such tests shall be of such character as may from time to time be approved by the Minister of Mines.

This rule shall come into force on January 1st, 1905, but the Minister of Mines may, should he deem it just so to do, by permission given in writing, allow to any mine a further reasonable time in which to prepare for such testing of lamps.

This rule shall not apply to a mine in which less than thirty persons are ordinarily employed below ground, or in which the average daily output does not exceed twenty-five tons."

For other cases on negligence in mines: see *McKelvey* v. *Le Roi*, *ante*, p. 13, and cases therein noted.

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LAST CHANCE MINING CO., LTD. v. AMERICAN BOY MINING CO., LTD.

Trespass Workings—Measure of Damages for Abstracted Ore—Negligence—Boundaries—Plans and Surveys—Onus of Proof—Evidence.

It is the duty of a mine-owner, when his workings approach his boundaries, to proceed with caution, and make surveys to prevent encroachment on adjoining properties, and the least evidence of bad faith on his part will make every intendment in favour of the injured party.

The measure of damages for ore negligently abstracted by trespass workings is the same as if the trespass is wilful, and only the cost of bringing the ore to bank will be allowed.

The value of the ore so abstracted is its value to its owner at the time of the taking.

Observations upon the burdens which a trespasser must assume.

Statement.

TRESPASS action tried at the Nelson Spring Assizes by MARTIN, J., on May 26, 27, 30 and 31, 1904, and brought by the plaintiff company, the owner of the Last Chance mineral claim, Crown granted, against the defendant company, the owner of the American Boy mineral claim, Crown granted. The claims adjoined, and the plaintiff charged that the defendant had knowingly and wilfully trespassed upon its claim by extending its underground workings thereon and abstracting a large amount of valuable ore therefrom. The trespass was admitted, but was alleged to be not wilful but inadvertent, and the questions to be decided were (1) the measure of damages in such case; and (2) the amount thereof. The other material facts appear from the judgment.

Argument.

Bodwell, K.C., and *A. M. Johnson*, for the plaintiff.

S. S. Taylor, K.C., and *O'Shea* for the defendant

The following authorities were referred to: *Wood* v. *Morewood* (1841), 3 Q. B. 440; 10 Morr. M. R. 77; *Trotter* v. *Maclean* (1879), 13 C. D. 575; *Livingston* v. *Rawyard Coal Co.* (1880), 5 A. C. 25; *United Coal Co.* v. *Canon City Coal Co.* (1897), 18 Morr. M. R. 639; *Omaha R. Co.* v. *Tabor* (1889), 13 Colo. 41; 21 Pac. 925; *Woodenware Co.* v. *U. S.* (1882), 106 U. S. 432; 1 Sup. Ct., 398; *Sinclair* v. *Cash Gold Mining Co.* (1896), 18 Morr. M. R., 523; *Armory* v. *Delamirie* (1722), 1 Strange, 504; Mayne on Damages, 6th ed., pp. 405-6; Lindley on Mines, 2nd ed. (1903), vol. 2, sec. 868.

Cur. adv. vult.

30th June, 1904.

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Judgment.

MARTIN, J.:—It is admitted that the defendant company, owning the American Boy mineral claim, Crown granted, has trespassed upon and abstracted ore from the plaintiffs' adjoining mineral claim, the Last Chance, also Crown granted; and the questions to be decided are two: (1) the measure of damages; (2) the amount thereof.

As to the first, the plaintiff company contends that the wrongful taking was willful, deliberate, and without colour of right; while the defendant urges that it was innocent and accidental, and therefore brought within the principle of such a case as *Wood* v. *Morewood* (1841), 3 Q. B. 440. Though there is something to be said in support of the graver contention, yet as it is tantamount to a charge of theft (for there is no moral difference between fraudulently taking an ingot of gold out of a mine owner's office above ground, and fraudulently and secretly abstracting valuable gold bearing ore from his claim below ground), a very clear case would have to be made out to support it, and the evidence does not warrant that conclusion here. There is, however, no difficulty in holding that the defendant must be found guilty of a negligent abstraction, for with a full appreciation of the close proximity of the plaintiff's line and the risk incurred, the work was continued at the place in question in general defiance of those ordinary precautions which ought to be observed under such circumstances; and in particular the contemplated survey should have been made before any more work was done in that locality. It is manifestly of the first importance that owners of adjoining mining claims should define their boundaries, and especially where extra-lateral rights are known to exist. This rule is so well settled that it is almost unnecessary to cite authority for it, but if any be needed it will be conveniently found in Lindley on Mines (2nd ed., 1903), vol. 2, sec. 868, pp. 1603-4, where the cases are summarized as follows:—

> "It is the duty of the owner of a mine on approaching his boundaries to make surveys to prevent encroachment on the adjoining lands, and the least evidence of bad faith on his part would make every intendment in favour of the injured party."

The defendant herein being found guilty of negligence the measure of damages is the same as if he were a wilful trespasser. What that measure is has been often considered, but the two cases of *Trotter* v. *MacLean* (1879), 13 C. D. 575, and *Livingstone* v. *Rawyards Coal Co.* (1880), 5 A. C. 25, set it forth very clearly. It is there laid down that there are two rules for determining the said measure, a milder and a severer. The former is that where the taking has been, *e.g.*, inadvertent, or under a *bona fide* belief in title,

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or by mere mistake, or where the real owner has notice but stands by, there will be allowed to the defendant the cost of severance of the coal from the realty as well as of bringing it to bank. The latter is, that where there has been, *e.g.*, fraud, or negligence, or willfulness, only the cost of bringing to bank will be allowed. And in each case the value of the mineral taken is its value at the time it was taken to the person from whom it was taken. Lord Chancellor Cairns in *Livingstone* v. *Rawyards*, pp. 31-2, and Lord Blackburn, at pp. 39-40.

These rules are practically the same in the United States, and are conveniently stated in *United Coal Co.* v. *Canon City Coal Co.* (1897), 18 Morr. M. R. 639, thus:—

"We are also of the opinion that the District Court applied a correct measure of damages. The defendants being wilful trespassers, it was proper to allow the full value of the coal mined, without deduction for their labour and expense in mining the same, the rule of damages being the value of the ore at the time and place it is severed from the realty. If the Court had found that the trespass of the defendants was innocent in character the rule would have been the value at the time of the conversion less the amount which the defendants by their labour had added to that value: *Omaha R. Co.* v. *Tabor* (1889), 13 Colo. 41; 21 Pac. 925; *Woodenware Co.* v. *U. S.* (1882), 106 U. S. 432, 1 Sup. Ct. 398."

And see also *St. Clair* v. *Cash Gold Mining Co.* (1896), 18 Morr. M. R. 523, and Lindley, *supra*, wherein it is laid down:—

"If the trespass is the result of an honest mistake, the defendant is compelled to pay only the value of the ore as it was in the mine, and can therefore limit the recovery first by the value of what is taken; second by the cost of mining, extraction, hoisting to the surface, or delivering it at the pit's mouth.

"If, on the other hand, the defendant takes out the ore, not as the result of an honest mistake or an honest intention, but under circumstances which shew that he has knowledge of the situation, he is entitled to no deduction, and he may not reduce the recovery by proving the cost of mining."

Coming then to the second question, the amount of damages. Now, at the outset, it is to be remarked that a trespasser finds himself placed in an unenviable position, and has to assume several heavy burdens:

First—"He cannot charge the person whose property he has invaded with the expenses of the exploration incidental and necessary to finding it (*i.e.*, ore), or reaching the vein which he spoliates by his trespass:" *St. Clair* v. *Cash Co.*, *supra*, p. 529.

Second—He must "show what he did and the value of what he took" *Ib.*, 530.

Third—He must "respond in damages to the highest limit of recovery, unless able to satisfy the jury of the honesty of (his) purpose and the good faith with which (he) did the work:"—*Ib.*, 532.

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Fourth—He must, where he has mixed the ore taken by trespass with his own, so that the plaintiff is unable to distinguish it, be prepared to do so clearly to the satisfaction of the jury, otherwise the plaintiff may recover the value of all the ore shewn to have been taken out, and the plaintiff's recovery is limited only by his own evidence on this subject; nor can the defendant complain if the jury fix a large estimate upon the damages: *Ib.* 532; Lindley, 1605.

"And although the evidence of the defendants may have been entirely uncontradicted, it by no means follows that the jury would have allowed the totality of the expenses as exhibited by the proof offered:" *Ib.* 528.

The consequences are really but the natural result of the application to mining operations of well known principles long ago enunciated in *Armory* v. *Delamirie* (1722), 1 Strange, 504, wherein it is laid down:—

"When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of a loss, the law will aid a recovery against the wrongdoer and supply the deficiency of proof caused by his misconduct by making every reasonable intendment against him and in favour of the party injured. . . . A man who wilfully places the property of others in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own, or in any other manner, will consequently be compelled to bear all the inconvenience of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole, if the parts cannot be discriminated, or responding in damages for the highest value at which the property can reasonably be estimated."

Applying the foregoing to the case at bar, I find that the defendant has to a greater or less extent mixed its own and the plaintiff's ores, or at least has failed to satisfactorily identify and distinguish between the various shipments, which amounts to the same thing. There is no definite information of the original shape or extent of the confiscated ore body, so the plaintiff has been forced to resort to scientific evidence, and as best it may on the existing meagre evidences of former extent, to reconstruct it, with the assistance of an experienced mining engineer; but in answer to which the defendant submits a counter reconstruction shewing a much smaller ore body based on its view of the facts so far as they have been proved.

In such circumstances, and because of the defendant's wrongdoing and failure to furnish precise proof of what was done, the whole question of extent becomes almost entirely a matter of inference and estimate, and I see no reason, on the facts which I feel justified in giving effect to, why the contention of the plaintiff as to the amount and value should not be accepted, as calculated by the witness Fowler; *i.e.*, eighty-four and one-tenth tons. It would appear to be a safe rule to adopt in such circumstances that where there is no reason

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to materially discredit a reconstruction made, as here, by a disinterested mining engineer of high standing having special knowledge of the mineral formations of the locality in question, such a reconstruction may be assumed to be substantially correct.

As to determining the exact value of the ore taken that may here be safely arrived at from the smelter returns of the three cars (Nos. 466-8) admittedly taken from the plaintiff's winze, because if the missing ore body were not part of that which was tapped by the winze, it was in all probability the nearest lenticular mass of similar nature, and may properly be taken for the basis of an estimate in accordance with the rule above cited.

Applying, therefore, the severer rule to this case, the cost of mining, estimated at $3.25 per ton, will be disallowed, but the following deductions should be made from the smelter returns:—

Sacking ore, per ton	$ 30
Raising ore from working face to surface, per ton	25
From surface to railway, including tramming	1 50
Freight and smelter treatment	15 00
Total, per ton	$17 05

In regard to the claim to increase the value by adding the amount of the Dominion Government lead bonus, it is sufficient to say that it was not granted till long after the trespass complained of, and the value, it has been seen, must be taken to be as it was at the time of the trespass.

The matter of calculating the exact value of the ore on the above basis, by taking the prices of silver and lead at the time of the trespass, is referred to the registrar in case the parties cannot agree on it; and judgment will be entered according to the result of the calculation. In case any difficulty arises before the Registrar the matter may be referred back to the Court.

So far as regards judgment being entered against the defendant McGuigan, that may be spoken to, for it was apparently overlooked by counsel on the argument.

NOTE.—In determining the boundaries of a mining lease, upon the lands of which it was alleged the defendant had trespassed, if the starting point of the survey can be established with certainty a remaining and untrue part of the description will be rejected under the rule *falsa demonstratio non nocet*: *In re Ovens* (1902), 23 Nov. Sc. 376.

Where a plan is tendered by one party as part of his general evidence and received, it may be used by the opposite party for all purposes to which it may be applied. *Ib.*

See as to damages for abstracted ore, *Centre Star Mining Co.* v. *Rossland-Kootenay Mining Co.*, *post*, p. 232.

MUIRHEAD ET AL. v. SPRUCE CREEK POWER CO., LTD.* 1904. September 13.

DUFF, J.

County Court Mining Jurisdiction—Prohibition—Stay of Proceedings under sec. 34—Application of Proceedings under Mining Jurisdiction.

Section 34 of the County Courts Act, which provides, *inter alia*, that if in any action of tort the plaintiff shall claim over $250 and the defendant objects to the action being tried in the County Court and gives security for trial in the Supreme Court, the proceedings in the County Court shall be stayed, applies to proceedings in the County Court under its mining jurisdiction.

Statement.

APPLICATION for prohibition to the Judge of the County Court of Vancouver from further proceeding with an action. The facts are stated in the judgment.

The application was argued at Atlin in September, 1904, before DUFF, J.

Argument.

Belyea, K.C., for the application.

Kappele, contra.

13th September, 1904.

Judgment.

DUFF, J.:—This is an application by the Spruce Creek Power Company, Limited, for an order prohibiting the Judge of the County Court of the county of Vancouver from further proceeding with an action in that Court entitled *Muirhead* v. *The Spruce Creek Power Co., Ltd.*

In this action the plaintiffs claim to recover against the defendant company damages caused by the overflow of water on the plaintiffs' property, resulting from a breaking of a ditch of the defendant company. The amount claimed is in excess of $250. The defendant company contends that under section 34 of the County Courts Act, it is entitled, by giving the notice referred to in that section, and providing the security referred to in that section, to have the proceedings in the County Court stayed. The notice has been given and the security has been provided. I have come to the conclusion that that section applies to proceedings in the County Court under the mining jurisdiction of that Court.

The language of the section itself does not suggest that its application is limited in respect of the particular class of jurisdiction invoked in the action to which the section is sought to be applied. It is contended that the provisions of Part 10 of the Placer Mining Act

*Also reported in 11 B. C. 1.

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are so sweeping in their character as to displace the operation of that section. I am unable to agree with that contention. It is true that section 133, which confers upon the County Court its special mining jurisdiction, does provide that the County Court shall in respect of the matters comprised within the sub-heads of that section have and exercise within the limits of its district all the jurisdiction and powers of a Court of law and equity. But that general provision is limited by section 135 of the same Act, which provides that "the provisions of all Acts for the time being in force regulating the duties of County Courts, County Court Judges, Registrars, Sheriffs, and other officers, and regulating the practice and procedure in County Courts shall so far as practicable, and not inconsistent with this Act, apply to the mining jurisdiction of the County Court."

The language of the last mentioned section is entirely without limitation, and I am unable to see that upon any proper principle of construction I should import into it any modification which would exclude from its operations the provisions of section 34 of the County Courts Act. My view is fortified by section 40 of the County Courts Act. That section provides that "the County Court shall also respectively have and exercise, concurrently with the Supreme Court of British Columbia, all the power and authority of the Supreme Court of British Columbia in the actions or matters hereinafter mentioned." Then follows a series of sub-sections conferring jurisdiction in a large number of cases, limited it is true as to value, but embracing within its sweep actions of almost every kind which would have come within the jurisdiction of a Court of equity prior to the amalgamation brought about by the Judicature Act.

It is difficult to understand why if section 34 is not to apply to actions brought in the County Court, and invoking the mining jurisdiction of the County Court, the section should at the same time apply to actions brought invoking the equitable jurisdiction of the County Court. It may be said, of course, that the mining jurisdiction is conferred by a special Act, but there is ample authority that where you have special statutes dealing with cognate or allied subjects and these statutes are brought together in consolidation, as is the case here, the whole consolidation is to be read as one Act. Part 10 of the Placer Mining Act ought therefore to be read as if it were a part of the County Courts Act, and there has been no argument presented to me, and I am unable to see that there is any sound ground upon which one can establish any distinction between the mining jurisdiction and the equitable jurisdiction in that respect.

It was pressed upon me, and I do not undervalue the importance of the point, that the effect of this view might be to deprive the

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County Court of its mining jurisdiction, or, at all events, to make the mining jurisdiction of the County Court conditional upon the consent of both parties. At first, I was inclined to think that the argument was a forcible one, but the consideration which I have been able to give to it in the time elapsing between the argument and this moment leads me to see that the consequences are not by any means so extensive as the argument presupposes.

Section 34 of the County Courts Act is limited to actions of contract, and actions of tort, in which the plaintiff claims the sum of in one case exceeding $500, and the other case exceeding $250. It is quite obvious that a very large number of cases which would come within the mining jurisdiction would not be affected by section 34—actions of ejectment, in which no sum is claimed; actions for declaration of right in which no sum is claimed; actions claiming simply an injunction, in which no sum is claimed; and others of which examples might be multiplied.

The application is, for prohibition, as I have said. That remedy is in the discretion of the Court. During the argument I intimated that I should not grant the order except upon the term that the defendants should go to trial at once, and that will be made a term of the order.

Prohibition granted.

NOTE.—See the next case, and *Brown* v. *Spruce Creek Power Co., Ltd.*, *post*, p. 254.

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SPRUCE CREEK POWER COMPANY, LIMITED, v. MUIRHEAD ET AL.*

Placer Mining Act—Water Record and Rights—Status of Free Miner—Water Clauses Consolidation Act—Mining Jurisdiction of County Court—Res Judicata—Trespass — Damages — Remedy of Self-help—Gold Commissioner's Powers—Construction of Statutes.

No one has a status to complain about the diversion or misuse of water by the holder of a water record unless he himself holds such a record under the Water Clauses Consolidation Act, which is an exclusive code on the subject of water rights, and the right to a flow of water is vested either in the Crown or in the holder of such a record.

The County Court in its mining jurisdiction has power to deal with actions respecting the disturbance of water rights appurtenant to mining property.

Observations upon the scope and object of the said Act and powers of the Gold Commissioner.

All the principles of construction of statutes cannot be applied to enactments such as the Mineral Act, which is constantly being amended without very careful consideration or supervision.

Statement.

ACTION respecting mining water rights tried at Atlin by DUFF, J., on September 16-17, 1904.

The plaintiff is a company incorporated under the Companies' Act, 1897, and amending Acts, and Part 4 of the Water Clauses Consolidation Act, 1897, and amending Acts, and is the owner of a water ditch having its intake upon Spruce Creek in the Atlin Mining District, at or about claim 17, below Discovery, and extending along the north side of Spruce Creek to a point approximately 8,500 feet below said intake. The company is also the owner of a water record, No. 92, for 1,200 miners' inches of water from Spruce Creek which water the company conveyed through the said ditch to its workings.

For the purpose of turning the water of Spruce Creek into the company's ditch, the company had caused a dam to be constructed just above its intake, by means of which the water was forced to that side of the creek on which the intake was situate.

The defendants are free miners owning and operating placer claims between the intake and return of the plaintiff's ditch.

From about the 1st of August, 1904, the water in Spruce Creek became very low, and by reason of the company diverting the greater portion thereof by means of its intake, the miners operating below the intake and above the return of the plaintiff's ditch, amongst them the defendants, were deprived of the quantity of water necessary to carry on their workings in a miner-like manner.

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*Also reported in 11 B. C. 68.

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Prior to the plaintiff becoming owner of said water record the miners on Spruce Creek, including the defendants, were given 300 miners' inches of water by a decision of the Gold Commissioner, which, together with two records of 100 and 200 inches, known as the Queen and Garrison records, the defendants claimed should flow down stream past the plaintiff's intake.

Application was therefore made to the Gold Commissioner for an order directing the company to allow 600 inches to pass its intake, and for the purpose of ascertaining the number of miners' inches in Spruce Creek above and below said intake he instructed the miners to measure the quantity of water in the company's ditch at its intake and in the creek above and below the intake. On the 16th of August the defendants proceeded to said intake, and for the purpose of measuring the water, closed down the plaintiff's gate at the intake and removed its dam, and early the next morning placed logs, rocks and gravel in front of the intake so as to prevent the flow of water into the company's ditch.

The plaintiff brought this action on the 18th of August for an injunction "restraining the defendants, their servants, agents and workmen from in any way interfering with the plaintiff's water ditch, head gates, waste gates, pipes and other plant and machinery used on and in connection with the plaintiff's hydraulic mines on Spruce Creek, Atlin Mining District, and for damages," and on the 22nd of August obtained an *interim* injunction as prayed.

On the 26th of August, three of the present defendants, Andrew Brown, Chris. Nissen and W. C. Smail, brought an action in the mining jurisdiction of the County Court at Atlin against the present plaintiff for a mandatory order compelling it to permit 600 miners' inches of water to flow down Spruce Creek past its intake on said creek, and on the 6th of September obtained a judgment in their favour to that effect.

On the 1st day of September the present plaintiff delivered its statement of claim herein, and in addition to the injunction and damages originally asked for in the indorsement on the writ claimed "a declaration that it is entitled as against the defendants under and by virtue of the said water record No. 92, to the uninterrupted use of 1,200 inches of the waters of Spruce Creek through its said ditch, flumes, pipes and monitors, upon any of its mining properties."

In answer to this claim the defendants pleaded the said judgment of the County Court in their favour.

Argument.

A. L. Belyea, K.C., for the plaintiff: The County Court in its mining jurisdiction has no power to hear disputes arising under the

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provisions of the Water Clauses Consolidation Act, and therefore this Court has jurisdiction to now go into the question of water rights between the plaintiff and defendants, and to grant the declaration asked for. Though by the old Placer Act of 1891 the mining jurisdiction of the County Court provided for suits respecting water rights claimed under that Act, the present Placer Act omits that provision.

Kappele, for defendants: The Act should be construed as it now stands, and if it gives the County Court jurisdiction this Court should give effect thereto when it has been exercised: see Placer Act, sec. 133, s.s. (1) and (4), and definition of "Mining Property" in sec. 2, which sections it is submitted give the County Court jurisdiction over this subject-matter. As to the claim for damages we rely on our right to the water as found by the learned County Court Judge, and on the direction of the Gold Commissioner to measure the water at the point where the trespass took place. The real issue between the parties, however, is the right to the water in question.

Judgment.

Per CURIAM:—I have come to the conclusion in this case that the plaintiffs are entitled to damages against Muirhead, Brown and Nissen, in the amount of $500. I have assessed the damages, as far as I can upon the evidence, on the basis of the actual damage suffered by the plaintiffs on account of the wrongful action of the defendants in the destruction of the plaintiffs' dam, which was chiefly the cause of injury suffered by the plaintiff company.

There is evidence from which I think I ought to infer that there was a combination in which the defendants, Muirhead, Brown and Nissen were parties, for taking such steps as they considered necessary (including the destruction of this dam) for the purpose of causing a flow of 600 inches of water to pass the plaintiffs' intake.

At first I was disposed to think that, assuming these defendants had a right to the flow of the water they were entitled to exercise the remedy of self-help to the extent of destroying the works which prevented the flow; but, in the first place, on that question of fact, I accept Mr. Blaine's evidence, and from that evidence it appears that the destruction of the dam was not necessary for the purpose referred to.

Further, as the plaintiff company is a power company, having a certificate approving its undertaking from the Lieutenant-Governor in Council under Part 4 of the Water Clauses Consolidation Act, and as these works were constructed on Crown property, the defendants could not, at all events without giving notice to the plaintiffs, exercise the remedy of self-help. In passing, I must say that I think it is a very fortunate thing indeed, that the good temper of the people who were involved in this contretemps prevented the consequences

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being more serious than a few angry words. It seems to me rather unfortunate in view of the elaborate provisions of the Water Consolidation Act, affording as I think, the most ample protection to the individual miners—being, as it seems to me it was intended it should be—the rock of defence both to the small proprietor and the individual miner against anything in the nature of a misuse or a monopoly of the water—considering I say, the very ample provisions of that Act for the prevention of a waste of water, and the misuse of water by people obtaining water records, and of a monopoly of water, it seems to me almost incredible that people should attempt to obtain redress by the rude and primitive method of taking the law in their own hands, when they have such ample recourse to the Gold Commissioner, who has power to grant a reduction or cancellation of the existing water records, or an interim record entitling the applicant to the use of the water comprised in such existing record, or to modify the record in such a way as to enable the applicant to use water in the proper way for which a record is given; I give these men credit for thinking that they had some vague official approval of some kind for what they were doing, although I am quite satisfied from what Mr. Fraser * has said that nothing he said to them justified any belief on their part that he approved of what they ultimately did. However, as I say, I give them credit for not wantonly, without colour or belief of any right on their part, destroying the property of other people, and, therefore, I fix damages at the actual amount which I find to be the damage suffered by the plaintiff company; and I do not award anything in the nature of vindictive or exemplary damages.

Now, the plaintiff company is also entitled to an injunction against Muirhead, Brown, Nissen, Smail and Lambert, restraining these defendants from in any way interfering with the intake, or with the ditch, or with the flow of the water into the intake and the ditch of the plaintiff company.

I was at first disposed to think that the plaintiffs should not recover anything from Smail and Lambert. Lambert was called as a witness, and he denied any complicity in the combination which I have found to have existed among the miners generally, and I accept his statement on that head, but he and Smail did attempt to interfere with the flow of the water into the plaintiffs' ditch, and they were only restrained from that by the remonstrances of the plaintiffs' men, and in fact, the whole interference—that is, the physical obstruction which they placed across the mouth of the intake —was removed by the plaintiffs' own employees.

* The Gold Commissioner.

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Under the circumstances, and in view of the fact that Lambert stated in the witness box that this was done in pursuance of what he considered his right, I think the plaintiff company are entitled to an injunction against all of the defendants in the terms I have mentioned.

As to the other branch of the claim, I have come to the conclusion that it is concluded by the decision of the County Court referred to in one of the paragraphs of the statement of defence. I do not propose now to discuss the question arising in the County Court action with regard to, or in respect of, priorities of the plaintiffs, or of the defendants, beyond saying this, that I have no doubt, speaking for myself, I have no doubt whatever that in order to acquire a status to complain about the diversion of water, any subject—be he a Free Miner, or otherwise—must acquire a water record, as the Water Consolidation Act now stands. My view is that the Water Consolidation Act constitutes an exclusive code on the subject of water rights in this Province. The right to the flow of the water is vested either in the Crown or in the holder of the water record—which is a thing clearly defined by the Act—not a vague or nebulous thing at all, but a thing clearly defined by the Act, a thing granted to an individual, or a definite number of individuals, and appurtenant to a distinct piece of property, fixing the place of diversion at a certain point and the place of return at a certain point, and providing for purposes for which the water is to be used. I say that no person not having such a record, in my judgment, has any status whatever in a Court to make any complaint about the misuse of water by the holder of a record. And I say this, that the rights of persons desiring records are amply protected, or I should say, the interests of such persons are amply protected by the section of the Water Consolidation Act which provides that upon an *ex parte* application to the Commissioner or Gold Commissioner, for leave to apply for a record, notwithstanding the existence of other records, leave may be given to the person making such application to apply for a record, and if the Gold Commissioner is satisfied that there is water that should properly be applied to other purposes, he may entertain such an application, and may grant another record.

It seems to me that there is nothing whatever in the Act to authorize the Gold Commissioner to make an apportionment in such a way that persons benefiting by this appropriation, or apportionment, shall have the right to come into Court and bring an action against another party, who is the holder of the existing water record, for misuse of water, where that apportionment of appropriation is not expressed in the water record. I do not wish to be misunderstood as saying the Gold Commissioner cannot impose conditions. The Act seems to give him the power to impose conditions; and it

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gives him power under certain conditions to direct the flow of water, and as regards Crown rights or Crown lands I have no doubt the Attorney-General, representing the Crown, would be in a position to enforce the provisions of the Act in those matters. The Act seems to be framed, and I think wisely framed, with a view of requiring a public record of water rights—analogous to records of similar character which we have, such as records of title to land, and records of title to mineral claims, and of timber rights, and it is a public record which shall be open to anybody who wishes to acquire mining property, and wishes to ascertain his position with regard to water rights, as well as mining rights. That seems to be the object of the Act, and I must say, after consideration of it, the Act seems to have gone a long way towards the accomplishing of that result. I am not expressing an opinion on the particular rights, or rather the particular priorities of these plaintiffs or defendants, which matter was decided on by the County Court Judge, because my view is that the County Court Judge had jurisdiction in the proceeding before him to decide on that question. My reason for thinking this is based upon Part 10 of the Act relating to County Courts (sec. 133, sub-sec. 4), which deals with the mining jurisdiction of the County Court.

"In all actions of trespass, or in respect of mineral claims, or other mining property, or upon or in respect of lands entered or trespassed on, in searching for, mining, or working minerals (other than coal), or for any other purpose directly connected with the business of mining (other than coal mining), or in the exercise of any power or privilege given, or claimed to be given by this Act, or any other Act relating to mining (other than coal mining)."

Now, this action, I think, is a personal action. It is an action of trespass on the case for damage for disturbance of an easement. That is, I mean to say, the action in the County Court, which is relied on, and therefore I think it comes within the scope of the sub-section which I have just read, reading the words in their usual and natural sense. A point has been raised in the course of the argument, which, at first, I was disposed to think would give rise to some difficulty. That is, that the Placer Act of 1891, in one of the sub-sections dealing with the jurisdiction I am now referring to, confers jurisdiction in suits relative to water rights claimed under this Act, or any other Act relating to mining. This is something which is entitled to some weight, but as I have said I think sub-section one of this section, read alone, would confer jurisdiction upon the County Court to deal with actions arising out of the disturbance of water rights; and I do not think that the particular reference to water rights in the repealed sub-section should cut down the scope of the general words. Personally, I hold the view that some, at all events, of the principles of statutory construction, involving pre-

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sumptions arising from the method in which particular legislative enactments have been dealt with, by way of amendment, cannot fully be applied in a legislative jurisdiction where amendments are made without very careful consideration or supervision, as they are in this Province; and I think that particularly in dealing with the Mining Act, in view of the very large number of amendments to that Act that yearly receive the sanction of the Legislature, one's only safe course generally is to take the language of the particular enactment in force, or rather the particular enactment governing the question under consideration, and to read that language, of course, in connection with the other language of the same statute in its natural signification, and to give effect to that, notwithstanding the way in which the subject-matter has been previously dealt with by the Legislature. So far as that part of the claim is concerned—so far as the plaintiffs' action claims a declaration of priority of water rights, there will be no order.

NOTE.—See the preceding case between the same parties.

For other cases on the Water Clauses Consolidation Act: see *In re Water Clauses Consolidation Act, and Rossland Power Co., Ltd.*, *ante*, p. 135, and cases there noted; and *Brown* v. *Spruce Creek Power Co., Ltd.*, *post*, p. 254.

SANDBERG v. FERGUSON.†

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Mineral Claim—Location of Fractional Claim, Irregularity in—No. 2 Post Planted in Glacier—Defective Notice on Post—Location Line—Sketch Plan —"Ground"—Misleading—Curative Provisions of sec. 16 (g) of Mineral Act, 1898—Surveyor's Duty.

Failure to put proper notices on a post will invalidate a fractional location, but that is a defect which in proper circumstances may be cured by sec. 16, sub-sec. (*g*) of the Mineral Act, 1898.

If the initial post is properly placed and the location line duly marked so that the position of the claim can be readily defined, the fact that the No. 2 post is placed in a moving glacier will not invalidate the location.

Per MARTIN, J.—"Ground" in the sections in question has not the sole restricted meaning of fixed earth or rock, but a wider signification depending upon the circumstances, and will in some cases at least include ice and hard snow.

In surveying mineral claims it is the duty of the surveyor to examine all posts and the location line.

It is sufficient if the sketch plan required by s.-s. (c) gives reasonable information of adjoining claims.

Decision of the Full Court of British Columbia affirmed.

Statement.

APPEAL by defendant from a judgment of the Full Court of the Supreme Court of British Columbia affirming the decision of MARTIN, J., in favour of the plaintiff in an adverse action tried at Nelson on May 30th and June 1st, 1903. The facts appear from the judgment of MARTIN, J., with the exception that it should now be stated that the No. 2 post of the Revenge, the plaintiff's claim, was defective in that it had not written on it the date of location and name of locator.

Argument.

S. S. Taylor, K.C., for plaintiff.

W. A. Macdonald, K.C., for defendant.

25th July, 1903.

Judgment at trial, MARTIN, J.

MARTIN, J.:—This is an adverse action to determine the title to two overlapping claims, the Glacier Fraction, the plaintiff's claim, and the Revenge, the defendant's. The Glacier Fraction is an over-location of the Revenge, which is the senior location, having been located on the 17th of July, 1900, and the Glacier Fraction, three days later, on the 20th of July. These claims are situate high up in the mountains, between 7,000 and 8,000 feet above sea level, about

* *Present*:—SEDGEWICK, GIROUARD, DAVIES, NESBITT, and KILLAM, JJ.
†Partly reported in 9 B. C. 123.

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nine or ten miles from Ferguson, in the Trout Lake Mining Division, in an exceptionally rugged country, but open and not obstructed in that place by bush.

Some objections were raised at the trial to the validity of the Glacier Fraction claim,* which were decided in favour of that location as being answered by the curative sections of the Mineral Act, and similar objections were also raised against the Revenge claim, in regard to which, with one exception, all that I think is necessary, for the present at least to say, is that I see no reason to change the opinion I formed at the trial that where such objections were established they are likewise cured by said sections. Should it be desirable, however, I shall deal with them later at a more convenient time.

The exception mentioned raises a novel point, that is, shortly, is a No. 2 post which is planted in a glacier a legal post?

To answer this question satisfactorily, it is necessary to understand all the facts which will throw light on the point, which is not so clear as at first might be thought.

Judgment at trial, MARTIN, J.

The location line of the Revenge claim is 1,423 feet nine inches in length. Starting from No. 1 post this line runs along a narrow ridge of rock or "hog-back" which is, comparatively speaking, more or less level for a distance stated by the most reliable witness to be between 500 and 700 feet, after which the solid ice edge of the glacier is encountered. One of the locators says that the edge of the glacier was solid ice with a few stones on top and no surface snow at that point. This edge it is stated, "rolled right up into the glacier, and from the rocky ridge where we were standing to the top of the edge of the glacier it would be about eight feet, like a wall." After that it rose gradually till it struck the flat, and then almost level to No. 2 post, rising from where the edge of it met the ridge a distance of 15 feet to where that post was planted. They cut a hole in the ice about two feet deep and put the post in and packed the ice round it. This post stood out conspicuously and could be easily seen from No. 1 post. Roughly speaking, about one-half of the claim appears to be on or covered by the glacier. It would have been possible, as I understand it, for them to have proceeded along their location line across the glacier and put this No. 2 post in earth or rock, but they did not do so, because they knew that by so doing they would encroach or trespass upon the ground of the adjoining Morning Star claim which is a partial continuation of both the Revenge and Glacier Fraction claims, and the Revenge claim would also then have been more than the statutory length, 1,500 feet. These objections they carefully avoided by measuring with a cord, with measurements marked on it, which they had brought with them for that purpose.

* See note at end.

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The evidence regarding the extent, formation and situation of this glacier is indefinite and unsatisfactory, and I expressed myself to that effect at the trial, but piecing the testimony of the most reliable witnesses together, it appears to be one of some considerable size, with a surface frontage line of about 1,300 feet, and a fall of about 200 feet. It is on the slope of the mountain with its highest point apparently on the Morning Star ground and with a natural slope down the mountain, and towards and beyond the easterly side line of the Revenge claim, which is 100 feet to the left of the location line. There is no evidence as to the depth of it, except that one of the witnesses, Ward, said that about 200 feet from the No. 2 post of the Revenge claim there was a break in it, and it was about seventy feet deep there. He also says that the glacier is nearly flat at one place and rises up behind at an angle of 70 degrees to the Mountain, and is cut off by a ridge of rock. Cummins, the surveyor, says that he calls the spot where the location line strikes the glacier the foot or lower end of it, and from that place it rose up steeply to a nearly level place beyond, and inclines up the mountain from that. He also says that for some distance the location line had the glacier on each side of it No witness, however, could give any satisfactory evidence in regard to where the actual channel of the glacier was in which it flowed, if it flowed at all. Cummins says that he was of the opinion that the glacier was a slowly moving one, perhaps a few inches a day in summer, but he could not say, as he had not observed glaciers much, and he did not make any measurements, and in order to determine the velocity of this one it would be necessary to place pegs. He says that he understands all glaciers move slowly, and that like rivers they move faster in the centre, and vary in velocity. There was no evidence at all as to whether or not at this particular point, or any point, the glacier had or had not moved as a matter of fact, and there is evidence (Andrew Ferguson) that at such a great altitude, though warm in the daytime during summer, it freezes at night.

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The witness Elliott says that about three days after the No. 2 post of the Revenge claim was placed in the ground he noticed that it had fallen down because of the sun melting the ice, but as against that there is the statement of Peter Ferguson, who went up there with Cummins, the engineer, some two months after, that the post was then in the very place where he had planted it, and it had not moved, and there certainly was a No. 2 post at the time of the surveyor's visit, though it is unfortunate that the surveyor himself did not go along the whole length of the location line, and up to that post. In my opinion it is the duty of a surveyor to examine all the posts and the location line in surveying a mineral claim.

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A glacier is defined in the Standard Dictionary (1894 Ed., 2 vols.), to be

"A field or stream of ice, formed in regions of perennial frost, from compacted snow, which moves slowly downward over slopes or through valleys until it either melts or breaks off in the form of icebergs on the borders of the sea. Glaciers are often much broken transversely by crevasses. They transport boulders and rock-debris in long lines called moraines which accumulate at the end as a terminal moraine. A glacier also grinds to "rock-flower" while it scratches grooves and polishes underlying rocks; and it furnishes streams of silt-bearing water from its constant melting, even in northern Greenland. The rate of movement of an Alpine glacier is from 10 to 20 inches daily in summer and half as much in winter; the maximum rates of some of the Greenland glaciers are said to be from 21 to 90 feet in 24 hours. The vast expanse of ice that sometimes (as in Greenland) furnishes glaciers is called an ice sheet, or glacial sheet."

On the question of the velocity of glaciers I find the following interesting note by William H. Dall (Director of the Scientific Corps of the Western Union Telegraph Co. Expedition) in his valuable book "Alaska and its Resources" (London, 1870) at p. 464:

"But little has been learned so far in regard to the rate of motion, and other circumstances connected with the magnificent system of the coast ranges of British Columbia. A road built across one of the glaciers of Bute Inlet by Mr. Waddington, of Victoria, was noticed to have moved some ten feet out of line during the winter season when the road builders returned in the spring. No regular observations have been made, however."

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There is, however, a great difference between true glaciers and deposits or beds of perennial ice and snow mentioned by Doctor Geo. W. Dawson, in his report on the Physical and Geological Features of a Portion of the Rocky Mountains (1886), p. 32*b*, wherein speaking of the Columbia-Kootenay Valley country, he says:

"Throughout the whole of this mountain region large patches of perennial snow are frequently met with at elevations surpassing 6,000 feet, and on northward slopes, and in retired valleys at lower heights. There are even some rather extensive snow fields, but no large connected portion of the mountains rises to such a height as to shew a well-marked snow-line. In the higher mountains near the forty-ninth parallel, masses of hard snow and ice exist which might be denominated glaciers, but further north true glaciers occur, with all the well-known characters of those of the Alps and other high mountain regions. Such glaciers may be seen on the north branch of the Kicking Horse, at the heads of the lakes forming the sources of the Bow, at the head-waters of the Red Deer and elsewhere, and are fed by snow fields, the areas of which have not been accurately mapped, but must in some cases be very extensive.

"At altitudes exceeding 6,000 feet, snow falls more or less frequently in every month in the year, and toward the first of October it may be expected to occur even in the lower valleys within the mountain region."

And see his remarks on p. 167*b* of the same report and his Preliminary Report on British Columbia (1877), pp. 133*b et seq.*: and also his further notes on "Glaciation and Superficial Deposits," at p. 40*b et seq.* of the Geological Survey Report for 1888-9 on the West Kootenay District, where the slow southerly movement of the

former great Cordillerran Glacier, over Toad Mountain, near Nelson, is noticed. The subject is also generally discussed by the same high authority in his report for 1894, pp. 248*b* *et seq.*

As I understand it, all true glaciers move in their channels more or less, but this may not apply to those portions of them which would correspond with eddies or backwaters of streams. As a local example of this movement, it may be noted that beyond all reasonable doubt, a stream of ice estimated at 700 feet deep flowed over what is now Victoria, and the grooving and striation caused thereby are even now plainly visible in the high places of that city. The stream had its source in the great glacier in the Straits of Georgia, which in its turn formed part of that vast sheet of ice known to scientific men as the Cordillerran Glacier — *vide* Dr. Dawson's Report on Vancouver Island, 1887, p. 99*b* *et seq.*

In giving the above references to scientific authorities on glaciers, I have done so, not for the purpose of using their remarks as evidence in this case, but to shew the necessity of being in full possession of the facts in regard to each particular glacier before deciding the effect of a partial location upon it under our Mineral Acts. This Court of course has judicial knowledge of the forces of nature up to a certain extent, but the application of what may theoretically at least be supposed to be general knowledge is limited by the facts of each particular case.

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It is contended by the plaintiff that the location now in question must be held to be invalid because section 16 of the Mineral Act says that a mineral claim shall be marked by two legal posts, and that by the interpretation section "legal post shall mean a stake standing not less than four feet above the ground," etc. The word "ground" twice occurs in section 15, as follows:

> "Any free miner desiring to locate a mineral claim, shall, subject to the provisions of this Act with respect to land which may be used for mining, enter upon the same and locate a plot of ground measuring, where possible, but not exceeding 1,500 feet in length by 1,500 feet in breadth, in as nearly as possible a rectangular form, etc. . . . In defining the size of a mineral claim, it shall be measured horizontally, irrespective of inequalities of the surface of the ground."

And it is also to be found in other places, *e.g.*, section 16, subsections (*c*) and (*d*) and section 18. The primary meaning of "ground" is defined by the Standard Dictionary to be:

> "The firm, solid portion of the earth at and near its surface; the surface of the earth, as distinguished from the regions above; also, the disintegrated material of the surface."

Plaintiff's counsel argues that a glacier is not "ground" in its primary or ordinary sense; that the statute requires the posts to be

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fixed in solid earth or rock, so that the location will begin and end in earth or rock; that the statute is imperative and is not satisfied by any substance intervening between the posts and the earth or rock beneath; and that the whole intent of the Act is permanency of location which is destroyed by any one of the posts being on a moving substance, if such should be found to be the case.

Now, it is first to be remarked that it is not "ground," so called, that a free miner is privileged to locate under section 12, but "waste lands of the Crown," and out of such waste lands he is entitled by section 15 to appropriate to himself "a plot of ground" 1,500 feet square. For the purpose of such entry upon and appropriation of part of the public domain, the terms "lands" or "land," in sections 13 and 15, must include the waters upon them, the words being used in their ordinary legal signification, which is conveniently given in Wharton's Law Lexicon (10th Ed., 1902) at p. 440, as follows:

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"Land, in its restrained sense, means soil, but in its legal acceptation it is a generic term, comprehending every species of ground on earth, as meadows, pastures, woods, moors, waters, marshes, furze, and heath; it includes also houses, mills, castles, and other buildings, for with the conveyance of the land the structures upon it pass also. And besides an indefinite extent upwards, it extends downwards to the globe's centre, hence the maxim, *Cujus est solum ejus est usque ad coelum et ad inferos*, or more curtly expressed, *Cujus est solum ejus est altum*. See *per* Jessel, M.R., *In re Metropolitan District Railway Company and Cosh*, 13 Ch. D. at p. 620. . . . Water, by a solecism, is held to be a species of land, *e.g.*, in order to recover possession of a pool or rivulet of water, the action must be brought for the land, *e.g.*, ten acres of land covered with water, and not for the water only."

And see also Williams on Real Property (1892), p. 33. The terms "land" and "ground" are therefore used in some sections of the Act, at least as having practically the same meaning, and even if the Act is to be construed in the sense that miners use the terms therein employed, then "ground" as defined in the Glossary of Mining Terms (1 M. M. C. 864) means (1) "Mining ground. The area covered by a mineral claim or mining location." Having then the right to locate a plot of "ground" out of such "lands," even when covered with water, and *a fortiori* with frozen water, it is not easy to perceive anything in the Act to prevent the locator from putting a legal post at the proper point on the location line, *i.e.*, 1,500 feet from the No. 1 post, within such plot of ground or land so long as it stands four feet above the ground or land, *i.e.*, above the surface of the same. The contention is doubtless correct that the element of permanency or fixity of position of the claim as located is contemplated by the Act and must so far as possible be preserved just as in the case of any other land homesteaded, or pre-empted, or purchased from the Crown or its subjects, there must, theoretically at least, be a solid and immovable substratum, though what would occur in the case of a mineral location made on what

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would admittedly be called "ground," yet is at the same time an enormous mass of slowly moving soil—a slide—such as was under consideration in the *Canadian Pacific Railway Co.* v. *Parke* (1897), 6 B. C. 6 at p. 9, and covered an area of 66 acres which was continually increasing, it is very difficult to foretell.

The language in question is not very definite; it merely provides that the post must be "above the ground," while section 16 containing directions for locating, simply says that the post shall be "placed" as near as possible on the line of the ledge or vein. In the original Gold Fields Act (1859), Rule ii. (1 M. M. C. 547) there was no uncertainty as regards the manner in which the pegs were to be fixed, for it was provided that claims should be rectangular as nearly as may be, "and marked by four pegs at the least, each peg to be four inches square at the least, and one foot above the surface, and firmly fixed in the ground." These words "firmly fixed in the ground," are repeated in the Gold Mining Ordinance of 1867, section 56 (1 M. M. C. 558), in the Mineral Act of 1884, section 58 (1 M. M. C. 579), and in the Consolidated Statutes of 1888, section 73 (1 M. M. C. 605), but in the Mineral Act of 1891, section 2 (1 M. M. C. 625), they have been changed to read as at present, "above the ground." This is a significant alteration which affects materially the present case, because if "ground" means as is contended, earth or rock, the post in question certainly stood not less than four feet above it. The section does not say that the post must stand on the surface of the ground, but that it must be "standing not less than four feet above the ground," which it literally does. True it is that it probably stands much more than four feet and it is urged that it would render the statute ridiculous to give it such a literal meaning. But on the other hand, a very strict meaning is also contended for, and it is admitted that the post in question would have been a legal one had the locator chopped down through the glacier a depth of say 15 feet to the solid frozen earth below and put in a post four feet above such earth, even though were the glacier a true one, *i.e.*, a moving one, the post would be pushed out of place and submerged. This result is even more ridiculous than the former, because the admittedly legal post would, in addition to being moved, be eleven feet below the level of the ice and invisible to other prospectors whom the statute aims at notifying and protecting; it would in fact be a trap for prospectors instead of a warning to them.

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Under said Gold Fields Act of 1859, though the claims had to be rectangular, and marked by four pegs, I do not think it would have been seriously contended that, because one of these four corner pegs happened to be placed in a pool eternally frozen, or in a true

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glacier, or that a corner ran into a deep lake, so that no peg at all could be fixed there, therefore the location was invalid. And it is to be hoped that the Mineral Acts do not treat the free miners of 1903 more harshly than the free miners of 1859; on the contrary, the marked tendency of late years has been to remedy defects and irregularities in location.

Suppose under the present Act that in a very high altitude in marking the location line along the ledge, a locator encounters at a distance of 1,300 feet from No. 1 post a mountain pool which was perpetually frozen to the bottom with what I should call eternal ice, or, which Dr. Dawson more correctly doubtless would probably describe as consisting of a hard mass of perennial snow and ice, beneath which the ledge disappears. Is the locator in such case forced to stop at the edge of the ice and lose the remaining 200 feet of his claim, which though covered with a thick or thin sheet of ice, may nevertheless, be the richest portion of it? Surely he would be entitled to put his post out on such eternal ice for the remaining distance of 200 feet, and secure a full sized claim, and continue his mining operations on the ledge beneath the ice if need be. Unless he could do so he would lose that 200 feet, for section 18, which permits the planting of what surveyors call "witness posts," does not apply to the placing of posts, but only to the marking of location lines; it says where "from the nature or shape of the ground it is impossible to mark the location line of the claim." But No. 2 post must be fixed before the location line can be accurately marked, because that line is defined to be "the straight line between posts Nos. 1 and 2." In my opinion, No. 2 post so placed in a perpetually frozen pool would satisfy the essential requirements of the Act, *i.e.*, fixity and notoriety. Eternal or perennial ice and hard snow should be deemed to be, in my opinion, "land" or "ground" within the true meaning of the said Act for the purpose of making a location.

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A reasonable view to take of the sections affecting this point seems to me to be that if the posts and location line were so placed and marked that the original position thereof (and from them the whole location) could at any reasonable time thereafter be determined with the amount of accuracy which is sufficient in the case of other claims, the statute would in practice be satisfied, even though a true glacier flowed over any part of the claim.

Supposing further, to take another illustration, that the location line of a claim was duly marked for 1,475 feet, till it touched a side of a true glacier and that 25 feet thereupon, at the end of the location line, the No. 2 post was planted; in such case there would be no difficulty at any reasonable later date in determining the true course of the remaining 25 feet of the location line, and no danger

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of the claim shifting its position, which I quite agree is something not to be permitted. On the other hand, a location made wholly on the surface of a true glacier would clearly be invalid, because its position never was and never could be fixed, assuming that it were possible that such a location could be made in view of the requirement that the discovery post must be put "at the point where he (locator) has found rock in place."

It comes then to a question of degree between extreme cases and is one to be determined on the particular facts proved at the trial. In the case at bar no practical difficulty arises because the location line has been sufficiently marked, and a survey has been made along it, and there is no evidence to shew that the glacier has moved at all, or, if it moves in what direction, which is important, because if it moves straight down the location line, end on, so to speak, towards No. 1 post, it would only shorten the line and not deflect it. Nor is it shewn whether or no the glacier is increasing or decreasing—for all that appears in evidence it may be, as is often the case, gradually wasting away and disappearing. All these are relevant matters of fact which require to be proved so that the Court may arrive at a sound judgment, but the proof is not forthcoming, though the onus lies upon the plaintiff, because the defendant's claim (the Revenge) is the senior location—*Schomberg* v. *Holden* (1899), 6 B. C. 419; (1 M. M. C. 290) and notes thereto: *Dunlop* v. *Haney* (1899), 7 B. C. 305; (1 M. M. C. 369) and notes thereto.

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From all the foregoing it would follow (1) that the term "ground" in the sections in question having regard to the sense in which it is used, has not the sole restricted meaning of fixed earth or rock, but a wider signification depending upon the circumstances of the location, and it will in some cases at least include ice and hard snow.

(2) That the validity of the location in question does not depend upon the bare question—Was the No. 2 post placed upon the ground or not? (using the term "ground" in the restricted sense contended for)—but the real question is—Was such post so placed that the position of the claim as originally located can at any reasonable time thereafter be determined with the degree of accuracy which is sufficient in the case of other claims located in the usual manner under the Mineral Acts.

Applying, then, this test to the facts herein, I have no hesitation in deciding the question in favour of the Revenge mineral claim.

The conclusion, then, being arrived at that the locators of the Revenge have complied with the requirements of the Mineral Act, it becomes unnecessary to consider the alternative defence set up, viz., that even if there were non-compliance, yet there had been a *bona*

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fide attempt to do so. Nevertheless, in case of a view contrary to mine being taken if there is an appeal, it is proper to state that I find as facts (1) that mineral in place was discovered on the Revenge claim; and (2) that the non-observance of the prescribed formalities was not of a character calculated to mislead other persons desiring to locate claims in that vicinity. And it is also due to the locators of the Revenge to say that they seem to have been animated by a very proper and unusual desire to avoid trespassing upon the Morning Star ground, and further, had they as was suggested, run their location line across the glacier and planted the No. 2 post on the other side of it, they would have placed themselves in a dangerous position, because then they would knowingly and deliberately have (1) exceeded the statutory length of the claim, and (2) trespassed upon ground lawfully occupied for mining purposes, with the result that in these two respects it would probably be urged against them that they had deliberately violated the statute, and so could not be said to have made a *bona fide* attempt to comply with it. In this relation it should not be overlooked that this Court casts a lenient eye upon irregularities in locations which are caused by a desire to avoid encroaching upon the rights of other free miners—*Waterhouse* v. *Liftchild* (1897), 6 B. C. 424; (1 M. M. C. 153) and note.

The result is that the Revenge mineral claim is hereby declared to be a valid location, and the Glacier Fractional mineral claim is declared to be an invalid location in so far as it overlaps or encroaches upon the Revenge mineral claim.

Action dismissed with costs.

Appeal to FULL COURT.

The plaintiff appealed and the appeal was argued at Vancouver on the 4th of November, 1903, before HUNTER, C.J., DRAKE and IRVING, JJ.

Argument.

S. S. Taylor, K.C., for appellant: The evidence shews that the glacier is a moving one. In staking, permanent monuments are necessary: see Lindley on Mines, vol. 1, s. 371. If the No. 2 post is moving, the whole claim is continually shifting. He cited *Drummond* v. *Long* (1886), 15 Morr. 511-12. If the glacier is moving then the No. 2 post is bad, and even if the glacier is not moving it is bad, as it must enter the ground.

[IRVING, J. See section 18.]

The privilege of locating is a qualified privilege; a locator has no privilege of locating everything; the Mineral Act is one dealing with minerals and earth and not with ice and snow; "ground" in the Act means actual earth.

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The location line has not been marked properly; it was marked by mounds (for 500 or 600 feet) up to the edge of the glacier, but after that the line was not marked; this is more than the non-observance of a formality within the meaning of section 16 (*g*).

The No. 2 post does not contain the proper notice, the date of location and name of the locator not being given, and these are both essentials and not formalities: see judgment of Sedgewick, J., in *Collom* v. *Manley* (1902), 32 S. C. R. 371. These omissions are calculated to mislead as there often are claims of the same name in the same locality.

W. A. Macdonald, K.C., for respondent (heard only on the question of the validity of a post set in ice): The locator did all he could in endeavouring to comply with the Act and the trial Judge holds he acted *bona fide.* He referred to *Eilers* v. *Boatman* (1883), 15 MORR. 462, 471; (1884), 111 U. S. 356, and *Waterhouse* v. *Liftchild* (1897), 6 B. C. 424, and cases cited in the judgment of the trial Judge.

Judgment of FULL COURT, HUNTER, C.J.

HUNTER, C.J.:—The facts in this case appear to be that No. 1 stake was set in solid earth and No. 2 in glacial ice, and it is argued by Mr. *Taylor* that because No. 2 was set in ice, and because the date of the location and the name of the locator did not appear on No. 2, the claim is invalid.

Now, I do not propose to consider the question as to what conclusion we should arrive at had No. 1 been placed in ice or earth that was in a state of motion. I do not think in this case it makes any difference whether No. 2 was placed in firm or moving ice, because the location line was well defined by a series ot mounds extending over a distance of 500 or 600 feet. I think therefore, on the particular facts of this case to which I propose to confine my attention, that the claim was sufficiently marked out and identified for all practical purposes, which is one of the cardinal matters which a prospector has to attend to. If he has marked out the claim so that it can be easily identified, having regard to all the local circumstances with which he is contending, then he has substantially complied with the provisions of the Act in that behalf, and his claim is good in law.

So far as concerns the absence of the date of the location and of the name of the locator from the notice No. 2, that omission was not calculated to mislead, as they appeared on No. 1, and as the location line was well defined. The appeal should be dismissed.

DRAKE J.

DRAKE, J.:—I agree. I think the locator did all that it was possible for him to do. He is not bound to do impossibilities, and

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it was a matter of impossibility to put a stake in the ground where No. 2 stake was to be—60 or 70 feet of ice to go through. He did the only thing possible for him to do, unless he put it at the edge of the glacier, in which case most probably he would have cut himself off from a great deal of mineral. This is one of those cases which I think falls distinctly with the purview of the Act, and I think he did all that he reasonably could do for the purpose of making a valid and *bona fide* location. The objection as to stake No. 2 is I think of no importance, as that is cured by one of the provisions of the Act; and no one could be misled, because from where one finds No. 1 anyone can see No. 2 and the direction of the location line. I think, under the circumstances, the appeal should be dismissed.

IRVING, J.

IRVING, J.:—I think the saving clause of section 16 was most properly invoked by the learned trial Judge. In my opinion, this Court should be slow to interfere with the discretion of the trial Judge in that respect.

Appeal dismissed with costs.

Appeal to S.C.

The defendant appealed to the Supreme Court of Canada, and the appeal was heard on October 21st, 1904.

Argument.

S. S. Taylor, K.C., for the appellant.

E. P. Davis, K.C., for respondent was not called on.

Cur. adv. vult.

24th October, 1904.

Judgment.

Per CURIAM:—This appeal should be dismissed on the grounds given in the Courts below.

Appeal dismissed with costs.

NOTE.—One of the objections, meriting attention, to the Glacier Fraction referred to on p. 166, was that there was not stated upon its initial post "as full a description as possible of the land bounding the 'fractional claim' as required by sub-sec. (*d*) of sec. 16 of the Mineral Act of 1898. What was written on the post in this respect was as follows:—"The boundaries of this fractional claim are intended to be the same as the boundaries of the Morning Star Mineral Claim, less 1,500 from No. 1 post of Morning Star Mineral Claim." It was contended for defendant that this was not a compliance with the Act which meant that the boundaries of adjoining claims should be stated, and that as a notice to prospectors it was not only misleading but confusing. Plaintiff's counsel urged that it was both unnecessary and impracticable to put on a post the names and boundaries of the surrounding claims as was required in the declaration under s.s. (*c*); the reference to the Morning Star Claim was sufficient as it was a well known claim and the first made in that locality: all the Act required was as full a description as is sufficient for identification, and here there was an open and rugged country with practically no trees and about 8,000 feet above sea level, and no prospector could have been misled.

Per CURIAM:—The language of the statute should be taken to mean as full as possible a description under all the surrounding circumstances, so that the claim can be identified. The description here, however, does not refer to

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the boundaries of any adjoining claim (though it is only such boundaries that concern the prospector) with one exception, the Morning Star.

Now it is quite true that it is not required that there should be on the posts an elaborate description of the location, but a description as brief as possible consistent with approximate accuracy which would convey some idea to the prospector of the adjoining "land"—and by that word I understand to be meant the ground located or occupied as mineral claims. This seems rather an elaborate requirement, but there it is and it cannot be ignored. In the present case I find that it has not been complied with; but at the same time I hold that the defect is cured by s.-s. (*g*). because there has been a bona fide attempt to properly locate, and a discovery of mineral in place, and the non-observance of this formality, having regard to all the local circumstances, is not of a character calculated to mislead other persons desiring to locate claims in the vicinity. The reference on the post to such a well-known, long established claim as the Morning Star, was something that, in the circumstances, was not only not misleading, but was of material assistance in determining the position of the location.

Another objection was that the sketch plan on the back of the declaration which according to sub-sec. (*c*) should shew "as near as may be the position of the adjoining mineral claims, and the shape and size, expressed in feet, of the fraction desired to be recorded," was inaccurate in that one claim shewn on it as the Triune was largely occupied ground belonging to the Silver Chief Claim, which was not mentioned.

Per CURIAM:—Though the sketch plan is not accurate in these respects and strictly speaking does not shew "as near as may be" the surrounding claims, for that expression* means a substantial compliance with the provisions of the Act, yet in practice it is difficult to apply that expression, and the plan does plainly give to prospectors reasonable information regarding surrounding claims, and hence I am satisfied that it fulfils the object of the statute, and even if not that the defect is in the circumstances cured by sub-sec. (*g*).

Objections over-ruled.

As to defective posts and location line: see list of cases at p. 504, in Vol. 1; and *British Lion Gold Ming. Co.* v. *Creamer*, *ante*, p. 51; *Snyder* v. *Ransom*, *ante*, p. 77; *Dockstcader* v. *Clark*, *post*, p. 192; *Rutherford* v. *Morgan*, *post*, p. 214.

* *Archibald* v. *Hubley* (1890), 18 S. C. R. 116, 122; *Reid* v. *Creighton* (1894), 24 S. C. 69.

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TANGHE v. MORGAN ET AL.*

Placer Claim Located on Mineral Claim—Essentials of a Placer Location—Application and Declaration—Belief—Placer Ground—Float—Record—Gold Commissioner's Powers—Unlawful Order of — Representation of Claim — Pleading—Amendment and Terms of—Charge of Fraud—Plan and Measurements—Placer Act, secs. 11, 13, 19, 24, 32, 33, 37, 38, 128, 129, 130, and Mineral Act, secs. 12, 16 and 28 — Jurisdiction — Appeal — Record — New Point—Course of Trial—Waiver.

A placer claim may be located on a lode claim.

Upon a locator of a placer claim tendering to the proper officer the proper documents in due form, accompanied by the proper fee, he is entitled to obtain a record for the claim, and such officer has no discretion in the issuance thereof.

Where a record is not granted to a locator in due course he shall, under the remedial provisions of sec. 19 of the Placer Mining Act, 1901, be deemed to have had such record issued to him at the time of his application therefor.

The validity of a placer mining record primarily depends upon the mere belief of the locator based upon indications he has observed on the claim in the existence of a deposit of placer gold therein.

Where the holder of a placer claim is prevented from properly representing it by the wrongful act of the Gold Commissioner, he will be excused from the consequences of such failure to represent.

The Gold Commissioner has no authority either under sec. 128, sub-sec. (*g*) of the Placer Mining Act, or otherwise, to change the entire location of a placer claim, and an order to that effect is one made wholly without jurisdiction and absolutely null and void.

Where it is sought to sustain an appeal on an issue outside the record, on the ground that nevertheless it was an issue fought out in the course of the trial, it must, particularly in a charge of fraud, appear that the attention of the Court and the adversary was directed to the fact that such an issue was being raised, otherwise a waiver of the necessity for a formal pleading will not be assumed.

Where the boundaries of conflicting locations are in dispute accurate measurements thereof should be taken and a plan prepared for use at trial.

Terms of amendment of pleadings and postponement of trial considered.

Decision of MARTIN, J., affirmed.

Statement. APPEAL by defendant Morgan from the judgment of MARTIN, J., holding the Shamrock placer claim to be a valid one. It was located at Poplar Creek Camp by the plaintiff on the defendant Morgan's mineral claim, the Lucky Jack, then being an existing lode claim, and assumed for the purposes of this suit to be validly located. The trial was held at Rossland, on 9th, 10th, 11th and 12th December, 1903.

Argument. *Hodge*, for the defendant company, the Great Northern Mines, Ltd.

W. A. Macdonald, K.C., for defendants Morgan and Fraser, moved on behalf of the defendant Morgan, pursuant to notice of motion given on the previous day, for leave to amend the statement of

*Partly reported in 11 B. C. 76.

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defence by adding certain paragraphs attacking the location of the Shamrock claim for failure to comply with certain statutory provisions, and also alleging that its record was "obtained by and on the false and fraudulent representations of the plaintiff made for that purpose," and setting out the particulars of the alleged fraud contained in the plaintiff's application for record:—There has not been time for the defendants to properly and fully put in their defence, for the writ was only issued on November 3rd, and the statement of claim delivered on November 12th, and statement of defence on November 25th. It is open to us to attack the location at any time, because sec. 33 of the Placer Mining Act states, "provided always that it shall at all times be open to prove that the ground was improperly or insufficiently staked or that the stakes have been illegally moved."

Argument.

MacNeill, K.C., *contra:* The statement of defence as it now stands is unquestionably deficient, because the general denials and allegations in paragraphs 3* and 12† thereof will be ignored since the facts must be specifically pleaded: *Hogg* v. *Farrell* (1895), 1 M. M. C. 79; and cases noted at p. 83; 6 B. C. 387; *Aldous* v. *Hall Mines Co.* (1897), 1 M. M. C. 213; 6 B. C. 394. Some of the proposed amendments I do not object to and am ready to meet, viz.: that the plaintiff never obtained a record for his claim as originally located; or that from the indications he observed on the claim he did not "have reason to believe that there was therein a deposit of placer gold," as required by par. 2 of the application for record, Form H. The charge of fraud I am not prepared to meet with the witnesses I have here now, and it is not the practice of this Court to allow so grave an issue to be raised at the eleventh hour; if the amendment is allowed then I must ask for a postponement of the trial. As to the attack upon our location, I am in the same position in regard to that also.

Macdonald, K.C.: Our whole objection to the location is that the north-east post was not cut down at the time of making the location, and it was not a post but a standing tree, which had never been cut off, and therefore was not a stake.

MacNeill, K.C.: I am not prepared to meet such an issue, and cannot accept the risk of proceeding with the trial without fresh

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* 3. On the 7th day of September, 1903, the plaintiff duly located a placer claim under the provisions of the Placer Mining Act and amendments, over a portion of the Lucky Jack Mineral Claim, about 300 yards east of Poplar Creek, and about 300 yards south of the Lardeau River in the Trout Lake Mining Division, and called such placer claim the "Shamrock" Placer Claim.

† 12. The defendants say that if the plaintiff had located a placer claim over a portion of the Lucky Jack Mineral Claim, which they do not admit, but deny, the said plaintiff did not comply with the provisions of the Placer Mining Act and amendments.

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evidence, particularly in view of the fact that there are no curative sections in the Placer Mining Act as there are in the Mineral Act to remedy defects of location.

Per CURIAM:—So far as the charge of fraud is concerned as proposed by par. 16, it is not I think one which should be made at this late stage of the case, and I do not feel disposed to allow it. As to the objection to the location, if the amendment is pressed it will in the circumstances and at this late stage only be on the terms of the postponement of the trial and the defendant Morgan paying forthwith all the costs of and occasioned by it. The words in sec. 33, "it shall at all times be open to prove, etc.," do not mean that one party may without notice and in the middle of a trial spring upon another party a number of alleged defects in his location and take him by surprise; they only mean that in all legal proceedings and in the manner authorized by the procedure of the Court in which they are taken, they may be raised.

So far as the application Form H., par. 2, is concerned, it is now reduced practically to a mere question of the plaintiff's belief.

The amendments not objected to by Mr. *MacNeill* are allowed.

Argument.

Macdonald, K.C.:—In view of the terms suggested I withdraw the application for an amendment other than as agreed upon.

Per CURIAM:—Then let the trial proceed.

The remaining material facts appear from the judgment.

At the close of the plaintiff's case the action was dismissed as against the Great Northern Mines, Ltd., with costs.

Cur. adv. vult.

April 2nd, 1904.

Judgment below, MARTIN, J.

MARTIN, J.:—This is a mining case raising questions of novelty and importance.

On the 9th day of July, 1903, a lode claim called the Lucky Jack was validly located near Poplar Creek, and is owned in whole or in part by the defendant Morgan.

Over two months thereafter, on the 7th of September, 1903, the plaintiff, acting in alleged exercise of his free miner's rights under the Placer Mining Act, located a placer claim called the Shamrock wholly within the boundaries of the existing lode claim.

It may be opportune to mention that this is something which has not infrequently occurred in this Province, and is contemplated by the Mineral Act and Placer Mining Act, which clearly recognize that there may be different mining rights on the same ground; see, *e.g.*, secs. 11, 32, 37 and 129 of the Placer Act, and secs. 12 and 26 of

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the Mineral Act. Several placer claims were in fact located on lode claims in the district in question. Placer and lode miners have frequently mined on the same ground without experiencing any difficulty, but the situation is one in which unless the various owners act reasonably and considerately, ill-feeling and conflict may easily be engendered, and it therefore behoves all concerned to act circumspectly and openly.

On the 19th of September the plaintiff, after preparing in due form the documents required by the Placer Mining Act, applied at the proper office for a record of his claim, and at the same time tendered said documents and paid the lawful fee and got a receipt from an officer of the Government then properly in charge, but by direction of the Gold Commissioner of the district, the defendant Frederick Fraser, the receipt given was not written on the customary office blank, but was drawn up in an informal manner, being what Fraser described as a "private receipt," whatever that may mean. The plaintiff asked for a record of his claim, but the Gold Commissioner practically refused to grant it on the ground that, as the result of an examination he had made that morning of the claim with the plaintiff, he, the plaintiff, had not proved it to be a *bona fide* placer location, and therefore was not entitled to a record; and he stated that he would "hold the application over," and refer it to the Attorney-General's Department and communicate with the plaintiff later. In the meantime, he made and left in the Recorder's office the following memorandum for that officer's guidance:—

Judgment below, MARTIN, J

"Memo. for Mr. Lucas.

"This application is a subject of correspondence, and is referred to the Attorney-General's Department; you will therefore be good enough to hold same over for final decision from Victoria.

Yours obediently,
FRED. FRASER,
Gold Commissioner.

What fancied statutory authority the Gold Commissioner relied upon in support of this method of procedure it is impossible to say, but none exists. On the contrary, the Act is clear that if the free miner makes application in due form to record his location and furnishes the recorder with the application and affidavit in proper form as required by sec. 11 of the Placer Mining Amendment Act, 1901, and pays the fee as provided by sec. 27 of the Placer Act, he is, in the language of that Act, "entitled to record the same," and the right to the exclusive possession thereof is immediately vested in him under secs. 31 and 32, subject to the observance of those requirements and other sections, such as 37, 38, 128 and 129.

It was the clear right, therefore, of the plaintiff at that time to obtain his record as soon as the clerk could record it, and it was

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likewise the plain duty of the Gold Commissioner not to interfere to prevent its issuance, for he had no inquisitorial powers or discretion in the matter. By this interference the plaintiff has suffered a wrong in not having had promptly granted to him that record to which he was entitled, and had there been no remedial statute he might have been placed in a very serious position by the error of the Gold Commissioner. But fortunately sec. 19 of the Placer Mining Act Amendment Act, 1901, was enacted to deal with just such cases, and it is as follows:—

"19. No free miner shall suffer from any act of omission or commission or delays on the part of any Government official, if such can be proven."

It was argued that this Court could not give effect to this section, but, it may be asked, if this Court cannot give effect to it, what was the object in passing it, and by what tribunal, and when, can it be put into operation? I have no doubt whatever that the section was enacted for the purpose of enabling this or any other Court having jurisdiction in mining cases to afford relief at the trial, or whenever proper, from the unfortunate consequences of an error of a Government official, and I do not hesitate to apply it here, the result being that the plaintiff must be regarded as being in the same position as though he had actually received at the time of his application that record which was his right.

Judgment below, MARTIN, J.

And in case it may be argued that the plaintiff did not properly represent his claim up to the beginning of the close season—the 1st of November—as required by sec. 38, he would be excused in this case from the performance of the provisions thereof by the operation of said sec. 19 because the Gold Commissioner by his illegal orders prevented him from doing so, as did also the defendant Morgan and his associates.

It is not necessary to express an opinion on the point as to whether or no the Gold Commissioner was right in the circumstances in requiring the plaintiff to give security (under sec. 12 of the Mineral Act or the same section in the Placer Act) for the object, and in the manner, and to the amount specified, because the demand was complied with and the point was not specifically raised nor argued.

Ultimately, and on the 24th of October, the delayed record was finally issued to the plaintiff, which, as has been stated, should have been issued on the 19th September, but it was accompanied by the following document:—

"MINING RECORDER'S OFFICE,
Kaslo, B.C., October 24th, 1903.

"*E. Tanghe, Esq.*,
Poplar Creek, B.C.

Re "*Shamrock Placer Claim.*

"Dear Sir.—In confirmation of my conversation of this morning and acting under authority of section 128, sub-section (*g*) of the Placer Mining Act,

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I do now order the posts, marking the easterly boundary line of the above claim, to be moved so as to mark out the westerly boundary line of said claim, leaving the now west boundary the east line of said Shamrock Placer Claim.

"I might here state for your information that during the visit over this claim, in company with Messrs. Morgan, Simpson and yourself, it became so apparent that, of the annoyance and interruptions that the 'Lucky Jack' M. C. owners must undergo owing to the Shamrock Placer Claim crossing their lead and overhanging the Big Showing, as must cause a constant source of danger to the mineral claim employees to such an extent that I have not the slightest hesitation in following up my powers and duties as Gold Commissioner in that protection due the quartz owner from the annoyance of the placer man under the circumstances of the present case.

"Obediently yours,

"FRED. FRASER,

"*Gold Commissioner.*"

Now, the effect of this "order" was to change the whole of the plaintiff's location so that, as altered, it did not include one square inch of ground which had been within its former boundaries; in other words, under the guise of moving posts an entirely new location was sought to be created and bestowed upon the plaintiff in substitution for his original claim. It is sufficient to say that, as might be expected, there is nothing in the Act which confers upon a Gold Commissioner or any one else powers so extraordinary; and it is difficult to imagine how that officer, who must be presumed to be a practical mining man, was induced to believe he had such an autocratic jurisdiction. His real powers are, in my opinion, quite large enough already. The sub-section here relied upon is a useful one in some cases, particularly under section 24, whereby if a claim owner removes of his own motion one of his posts for an unlawful purpose his claim thereby becomes forfeited, and it is very proper that when it becomes necessary in the course of surveying, mining, or other operations, to remove posts, that the Gold Commissioner should order it to be done. But that is something radically different from what he purported to do here; nor was his action justified by sub-sec. (e), for that relates to extending, not curtailing, the limits of a claim; nor by sub-sec. (f) for this is not a case of disputed boundaries; nor by the general section 130, because what he did was not in any way "necessary or expedient for the carrying out of the provisions of" the Act.

Judgment below, MARTIN, J.

The so-called order, therefore, may be disregarded, because it was made wholly without jurisdiction, and is absolutely null and void, and the record stands freed from any limitations sought to be imposed thereby. The minute of the order indorsed upon the record and entered in the books of the mining recorder should be cancelled; it presumably has been recorded under sec. 13 of the Placer Mining Act Amendment Act of 1901.

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In the statement of claim a charge of lack of good faith is brought against the Gold Commissioner (par. 7), and it is doubtless on that account that he is made a party defendant to the action, though no specific relief is prayed against him. While this defendant lent a too willing ear to the representations of the owners of the Lucky Jack, identifying himself too closely with their interests, and acted without due discretion, and to a certain extent laid himself open to the animadversions of counsel, yet I hardly feel justified in going to the length of finding that he acted in bad faith between the parties. At the same time his course of conduct was undoubtedly such as to place the plaintiff in a very ambiguous and embarrassing position, whereby he was prejudiced and delayed in the exercise of his rights, and was almost forced to make Fraser a party to this action. In such circumstances, while the plaintiff is not successful, and the defendant Fraser is entitled to have the action dismissed against him, which is hereby ordered, yet his conduct taken as a whole has been such that I do not feel called upon to make an order for costs in his favour.

Judgment below, MARTIN, J.

But though the plaintiff was entitled to have his location recorded as aforesaid, yet the validity thereof is attacked on the ground that in truth it is not a placer claim at all, though so styled, and that nothing was found on the claim to warrant the statement in the affidavit, par. 2:—

> "That from indications I have observed on the claim applied for I have reason to believe that there is therein a deposit of placer gold."

The first thing that strikes the inquirer into the Placer Act is the very indefinite nature of the affidavit on which a record is obtained. This is in marked contrast to the Mineral Act, wherein the discovery of mineral in place must be sworn to (Form S. 6), and the locator cannot even invoke the remedial and curative section 16, s.-s. (g), unless he can prove that he has "actually discovered mineral in place on said location." But in placer claims, all that he is required to pledge his oath to is that "from indications I have observed on the claim applied for, I have reason to believe that there is therein a deposit of placer gold." In the one case the fact of mineral in place must be established—*Manley* v. *Collom* (1901-2), 1 M. M. C. 487—but in the other the existence of "a reason to believe," however wildly erroneous, is sufficient. This introduces an element of great uncertainty into the record, for the more ignorant and credulous a prospector is, the more may he have "reason to believe" that he has found a placer claim. It is well nigh impossible to probe into a man's mind and arrive at a satisfactory conclusion regarding his reason for belief in the "indications" he has observed on his claim; there is practically no means of weighing or determining such a

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vague issue; I have been unable to think of any method, nor have counsel been able to suggest one. It is urged that the defendant has established that this is not a placer claim at all, because there is no placer ground in it, and that any prospector or miner of the most elementary knowledge could in a very short time satisfy himself of this fact beyond peradventure. Assuming all this to be the case, we get very little further, for it does not touch the one necessary element, *i.e.*, the belief. It is further argued that in the circumstances no sensible man could have thought that the claim was placer ground, and therefore it must be assumed that the act of the plaintiff was fraudulent, and that he had not the requisite belief, but simply aimed at appropriating some rich ground from a lode claim and blackmailing the owner thereof. But the difficulty is that the belief required is not that of a sensible or an honest man; the insane delusion of a criminal under the Placer Act is just as efficacious, and it would require very strong evidence, stronger than has been adduced here, to justify the Court in coming to the conclusion that the belief was entirely absent, even in the case of a locator who has acted in such a suspicious and dubious manner as has this plaintiff. The fact that under colour of a location which he thought he was entitled to to some extent, he intended to harass and obstruct the defendant by setting up extravagant claims with the idea of being bought out, would not detract from the effect of his entertaining a belief that he had placer rights, however small or valueless in a mining sense they might be. That this was the case here I have little doubt.

Judgment below, MARTIN, J.

This branch of the case is thus left in a manner far from satisfactory to my mind, but on all the facts I have decided to give the plaintiff the benefit of the doubt, and hold that the existence of the statutory belief as sworn to has not been disproved, the onus of doing which is upon the defendant, and it follows therefore, that the Shamrock placer claim must be taken to be a valid location.

I turn now to the claim of the plaintiff against the defendant Morgan for the alleged wrongful conversion of gold from the plaintiff's claim.

It appears that on the Lucky Jack there was at the time of the location of the Shamrock placer claim (Sept. 7th), and within the boundaries of the Shamrock, an exposed free milling white quartz ledge, about 3 feet in width, of remarkable appearance, and running up the steep and rocky mountain side, called the "big showing," and depicted on the photograph, Exhibit T. 12, and in the plan prepared by order of this Court by Henry B. Smith, P.L.S., dated December 28th, 1903. On portions of this ledge, when located, gold was exposed prominently, and the ore was in places so valuable and easily detachable that it was necessary to keep a guard over it. The

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plaintiff does not claim any of such ore that was "in place," but when the Lucky Jack was located (July 9th, 1903) there were also at the side and within a few feet of and below the ledge, and particularly where it is badly faulted beneath the "big showing," (as shown by the blue line on exhibit T. 12) detached pieces of quartz containing appreciable values in gold to a greater or less degree; and a number of these pieces also lay on top of the faulted portion which widened out to about six feet; they lay, before being disturbed by man, in the position where they had been dislodged from the ledge by the course of nature, and the configuration of the ground is such that they must be deemed to have fallen from that ledge and none other.

The plaintiff claims these loose fragments because he alleges they are "float," and not "rock in place," and therefore not the property of the lode owner, but that of the placer owner.

In answer to this contention the defendant says:—

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First, that as a matter of fact he had already gathered up and appropriated to his own use the said pieces of so-called "float" between the time of the location of his own claim on July 9th, and the plaintiff's location on September 7th, and therefore he cannot be called upon to account to the plaintiff therefor; and further, that any detached fragments of gold-bearing quartz which were lying on the portion of the claim in question when and after the Shamrock was located had been broken or blasted out of the "big showing" by the defendant, and therefore were his own property as coming from his lead.

Second, he alternatively contends that if these issues of fact be found against him his action in taking the said fragments is justifiable as being in pursuance of his legal rights as a lode owner.

It therefore becomes necessary to first determine the questions of fact, for however interesting the legal question may be, it would be unprofitable and undesirable to go into it if the facts were found to exclude its application to the present case.

Now assuming that this float, so-called, could have been taken by the placer owner, the onus is on him, the plaintiff, to prove (1) that it was at the time he located his claim within the limits thereof, and (2) that it was the defendant who wrongfully converted it to his own use. The evidence to support such a charge should be precise and clear both as to time, place and amount, but not only was the plaintiff most vague and loose in his statements, but was wholly unsupported by other evidence, or by any measurements whatever, though the importance of them has been repeatedly pointed out by this Court: see *Bleekir* v. *Chisholm* (1896), 1 M. M. C. 112; *Waterhouse* v. *Liftchild* (1897) *Ib.*, 153; and *Dunlop* v. *Haney* (1899), *Ib.*,

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369. In none of those cases were measurements more necessary than in the present, where the plaintiff's lack of knowledge of the position of his own claim as regards the "big showing," and the place where the trespass complained of must have occurred, if at all, is so astonishing that he actually contended his location excluded all of the "big showing" except the top corner (see his sketch in red on Ex. T. 12), whereas the survey directed by the Court shews that it really included the whole of it. So striking an error in so important a point of the case, taken in conjunction with the way in which the plaintiff is flatly contradicted by several other witnesses, renders it impossible for me to place any reliance upon his statements, and even on his own evidence, unsupported, I should hestitate long before giving judgment in his favour for any amount, however small. But the defendant Morgan contradicts him and says that all the quartz he picked up after the 7th of September—the date of the location of the Shamrock—was what came from his own workings in breaking down and blasting out the "big showing," in the doing of which fragments of quartz were shot out to a considerable distance from and below that point. In the face of this denial I find it impossible to hold that the defendant has taken anything the plaintiff would be entitled to even if his contention regarding the float were correct, and it therefore becomes unnecessary to discuss the legal point above mentioned, which, should it arise again, will doubtless be disposed of to better advantage than in this case where more evidence from placer miners of experience should have been forthcoming to assist the Court in coming to a proper conclusion.

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I have not overlooked the fact that the plaintiff also contends that in addition to said float there were boulders of quartz scattered about that undefined portion of the ground which is in dispute near the "big showing," and which he claims as carrying gold and as appertaining to his claim. These, he says, the defendant took and prevented him from taking, and he asserts that it was one of these small boulders that he had broken and was breaking up when he was arrested. But the broken rock produced in Court does not answer his description, and he seeks to meet this discrepancy by alleging that the rock now produced has been fraudulently changed for that which he was taking off his claim. It is sufficient to say that this story is rejected, and it only serves to show what little credence can be placed upon the plaintiff's veracity. In such circumstances it would be idle and profitless to consider further his right to these boulders, for there is nothing to satisfy me that they carry any gold value whatever, or are of any value to miners, placer or lode. Whatever they may be, they do not, on the evidence so far, appertain to the placer claim more than to the lode claim. If it is deemed desirable or worth while to test their ownership some definite evidence, accompanied by the

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result of tests, should be offered so that the Court could have something certain to found its judgment upon, and not mere vague statements and loose and extravagant assertions which result in nothing except confusion.

The plaintiff asks that the defendant Morgan should be restrained from interfering with or preventing his working his claim. This branch of the case is clear, and there is no doubt that the defendant has acted in an illegal manner, and obstructed the plaintiff in the exercise of his lawful rights, in the belief that his location was an invalid one. It may be that there is no placer gold on the plaintiff's claim, and that he is simply wasting his time and money in endeavouring to work it, but since he has a valid claim he is entitled to work it as he pleases, subject to the restrictions imposed by the Act. There will consequently be judgment in the plaintiff's favour on this branch and an injunction as prayed restraining the defendant Morgan, his servants or agents from interfering with the plaintiff in the lawful working of his claim.

The plaintiff on the whole case is entitled to the costs of the action against the defendant Morgan, less any extra costs which may have been incurred in defending the issue on which he has been unsuccessful, viz.: the wrongful conversion.

During the trial the action was dismissed with costs as against the Great Northern Mines, Limited, no case being made out against that company.

Finally, I draw attention to the expense and delay that have been caused by the neglect of either party to take measurements or prepare a plan: in cases of this nature that should always be done, otherwise the examination of witnesses is rendered difficult and uncertain, and additional expense and delay are incurred by undue prolongation of the trial.

Judgment accordingly.

Appeal to FULL COURT.

The defendant Morgan appealed, and the appeal was argued at Vancouver on the 9th, 10th and 11th of November, 1904, before HUNTER, C.J., IRVING and DUFF, JJ.

Argument.

W. A. Macdonald, K.C., for appellant: Our contention is that the placer claim was bogus and was located in bad faith for the sole purpose of harassing the holder of the quartz claim: the applicant of a placer claim must swear that he has reason to believe the ground contains placer gold, and that he makes the application in good faith for the sole purpose of mining: see the Placer Amendment Act, 1901, sec. 37, sub-secs. 2 and 7. Lack of "reason to believe," and also the lack of good faith, can be shown from the surrounding circumstances.

MacNeill, K.C.: Bad faith is not pleaded.

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Macdonald: It was not necessary to plead it as the plaintiff had no record for his claim: he asked to have defects cured so he must show that he has complied with all essentials.

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By "reason to believe" is meant an honest reason, and not one manufactured for the occasion: see *Howard* v. *Clark* (1888), 20 Q. B. D. 558; and *In re Walker*, (1890) 59 L. J. Ch. 386.

He referred to the evidence and submits that no reasonable miner would have considered this a placer claim, and that the plaintiff could not think it was placer ground simply because he saw float exposed thereon.

[HUNTER, C.J.—When plaintiff said to the Gold Commissioner "I want that float or nothing," I think he meant the ground under the float: he might have considered the float an indication of a placer claim. It seems clear to me that a quartz claim and a placer claim covering the same ground cannot be worked to advantage at the same time: there should be some provision whereby work on one of them should stand until the other is worked out.]

The plaintiff has no record and no title, and there is no jurisdiction in the Court to grant it.

The Court, here intimated that on the record as it stood the appeal should be dismissed, but that it appeared that the issue of "bad faith" had not been tried.

Argument.

MacNeill: I will agree to treat it as if the question of "bad faith" had been raised and consider all necessary amendments made.

Per CURIAM:—You need not do that as you have a right to refer to the evidence to show that there is no necessity for a new trial.

MacNeill: Plaintiff found float or pieces of quartz on the ground to the value of $4,000 or $5,000, to which he was entitled under his location: float is the "floe" or flow from the lead: the flow of an iceberg and the flow of a lead are similar.

[DUFF, J.:—If there was float of the value you state that would show a reason for locating, and the onus would be on the other side to show it was not there.]

Counsel referred to *Stevens* v. *Gill*, 1 Morr. 576; *Stevens* v. *Williams*, *Ib.* 558, 561; *Tabor* v. *Dexter*, (1879) 9 Morr. 614; and Lindley on Mines, 2nd ed., 1903, secs. 299 and 323.

At the conclusion of the argument judgment was delivered as follows:

Judgment.

HUNTER, C.J.:—The appeal will be dismissed. I now feel satisfied that there would be no object to be gained in granting a new trial as even if we thought it right under the circumstances to allow

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an amendment to raise the defence of bad faith it would be an impracticable defence in view of the evidence already before us, as it would be hopeless to expect a finding that the plaintiff did not *bona fide* claim a right to locate the float under the Placer Act. I will only add that I think this case signalizes the necessity for a change in the law, and that a placer claim should not be allowed to be located over a mineral claim without the previous written permission of the Gold Commissioner. It seldom if ever happens that placer gold is found in paying quantities on lode ground, and in the vast majority of cases the location of a placer claim over such ground is the act of either a deluded or a fraudulent mind, and can only result in undue embarrassment to the owner of the mineral claim.

IRVING, J.

IRVING, J.:—The statute contemplates that there may be two sets of people working the same property; that is to say, that there may be placer miners and mineral miners working side by side, or one underground and the other on the surface. When this is taken into consideration, it will be seen that disputes are likely to arise between these two sets of people as to how their respective claims shall be worked. To obviate these difficulties the Legislature has said matters of this kind shall be left to the Gold Commissioner to whom most extensive powers have been given. I am satisfied that nearly all the matters which have been debated before us during the last day and a half are matters which should have come before and been settled by that officer.

I think on the pleadings there was only one issue open, that is, the question of belief—paragraph 2. The question of *mala fides*—paragraph 7—was not raised on the pleadings, nor was it raised unequivocally during the evidence so as to put the plaintiff on his guard. I think that the judgment ought to be affirmed and the appeal dismissed.

DUFF, J.

DUFF, J.:—I concur in the dismissal of this appeal. The ground on which the appeal is mainly based is an allegation that paragraph 7 of the plaintiff's statutory affidavit leading to the record of his claim is untrue. That is an allegation of fraud coupled with perjury; and upon it the defendant could only succeed *secundum allegata et probata*. Yet this charge finds no place in the pleadings; nor does it appear that during the trial it was specifically propounded; and still less that any issue involving such a charge was determined or investigated.

A case based upon such an allegation must, under the express provisions of the Rules, be placed upon the pleadings—and that too, with exact particularity. The party's right to insist upon compliance

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with this rule may of course be waived; and waiver may doubtless be implied from the conduct of the parties at the trial.

But where conduct is relied upon as a waiver, it must, I think, be shewn clearly and unmistakably that the charge was propounded with sufficient distinctness to bring to the knowledge of the adversary the specific nature of it, as well as the fact that it was put forward as a ground of claim or defence, as the case might be; and that the adversary, not choosing to insist on his strict rights, accepted the challenge and shaped his case to meet it: see *Browne* v. *Dunn,* (1894) 6 R. 67. Moreover, I do not think that the Court of Appeal ought to consider as a valid ground for interfering with the judgment of a trial Court an allegation of fraud—however seemingly well supported on the evidence—not found in the pleadings, unless it appears that the tribunal was made distinctly aware of the proposal to raise such an issue at a stage of the trial sufficiently early to enable the tribunal to follow the oral evidence with an eye to the determination of that issue.

I only wish to add that I am not at all impressed with the suggestion that our decision will expose mine-owners to invasion and disturbance by marauding locators under the colour of title to placer locations taken up with the sole object of exacting ransom. In such a case, on an issue properly framed, I cannot suppose that the Court would, under the existing law, fail to discover an appropriate and adequate remedy; but the issue which would be presented in such a case was not at the proper time raised here, and, therefore, has not been decided here.

Appeal dismissed with costs.

NOTE.—*Cf. R.* v. *Tanghe, ante,* p. 139; and *Rutherford* v. *Morgan, post,* p. 214.

As to powers and mistakes of Gold Commissioner and Mining Recorder in general, and curing same: see *Woodbury* v. *Hudnut* (1884), 1 M. M. C. 31; *Wilson* v. *Whitten* (1889), *Ib.* 38; *Lawr.* v. *Parker* (1901), *Ib.* 456; *Rutherford* v. *Morgan, post,* p. 214.

As to amendment of pleading and terms and postponement of trial: see *Noble Five Con. Mining Co.* v. *Last Chance Mining Co., ante,* p. 35; and *Hanna* v. *Morgan, ante,* p. 142.

Since Form H, sec. 2, requires the locator to swear to his belief in the existence of "a deposit of placer gold," under the Act as it now stands no other kind of placer ground could be located if it should be discovered: *Vide* definition of "placer mine" in sec. 2 of Placer Act.

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DOCKSTEADER v. CLARK.*

FULL COURT. *Mineral Claim — Location — Over-Location on Valid Location — Unoccupied Crown Lands—Agent, Location by—Defect or Irregularity—Initial Post—Location Line—Compass Bearing—Misleading—Finding of Fact by Trial Judge—Curative Provisions of sub-sec. (g) of sec. 16 of Mineral Act, 1898.*

A mineral claim may be located by an agent.

If the location line crosses other existing valid locations it does not invalidate the junior location unless in the circumstances it is calculated to mislead.

If the initial post is placed on an existing valid location it does not invalidate the junior location unless in the circumstances it is calculated to mislead.

The question as to whether a deviation from any of the formalities prescribed by the Act is calculated to mislead is one of fact depending on the nature of the *locus in quo*.

The learned trial Judge having found that an error in an approximate compass bearing of 77° 50″ was in the circumstances calculated to mislead his finding would not be disturbed unless shewn to be clearly wrong.

Decision of Irving, J., affirmed.

Per MARTIN, J., dissenting.—An initial post placed as aforesaid is within a proscribed area and cannot be the foundation of a valid location, and s.s. (*g*) cannot be invoked to cure the defect.

Statement. APPEAL by defendant from a judgment of IRVING, J., in an adverse action between two conflicting mineral claims, the Colonial, the senior location, the property of the plaintiff, located on October 7th, 1900, and duly recorded, and the Wild Rose Fraction, the junior location, the property of the defendant, located on September 4th, 1902, and duly recorded, both of which claims were substantially over-locations of the Cody Fraction, which was located on August 3rd, 1896, and duly recorded. The initial post of the Colonial was placed 290 feet within the boundary of the Chicago mineral claim which was at and before the time of such placing a valid Crown granted claim. The location line of the Colonial ran from the initial post on Chicago ground for 290 feet, thence for 109.0 feet on ground then open to location though nominally occupied by an invalid location, the Cody Fraction, until it reached and crossed the boundary of the Freddie Lee, a valid Crown granted location, thence on Freddie Lee ground for about 642 feet, and thence for about 410 on ground open to location to the No. 2 post. The approximate compass bearing was stated on the initial post of the Cody Fraction to be "south-westerly" instead of "south-easterly," which would make a difference of about a third of a mile in the position of the No. 2 post.

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*Partly reported in 11 B. C. 37.

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The trial took place at Nelson on October 20th, 21st, 26th and 27th, 1903.

S. S. Taylor, K.C., for plaintiff.

W. A. Macdonald, K.C., and *A. M. Johnson,* for defendant.

Judgment was delivered at the conclusion of the trial.

Per CURIAM:—This is an action, brought by the owner of the Colonial to adverse the Wild Rose. The location of the Colonial on the seventh of October, 1900, was proved. Unless it is shown to be invalidated on one or other of the following grounds it is a good location.

Argument.

The first ground is:—Was the Cody fraction a live claim on the 7th of October, 1900?

The second point is:—Was the location of the Colonial invalidated by putting its number one post on the Chicago, which had been Crown granted some three months previous, namely: 23rd of July, 1900, and also by the location line of the Colonial being on the Freddie Lee and the Chicago?

Dealing with the first point: I find that the Cody fraction was recorded on the 3rd of August, 1896, as running its No. 1 post to its No. 2 in a south-easterly direction. The declaration required to be deposited with the Recorders so states that in words, and the form on the back of it shows the location line ran from west to east. It was staked, according to Biggar, the original locator whose evidence I accept "south-westerly," to be exact S. 52° 52", W. There is a difference there, allowing a good margin for the expression "south-east," of some 77° 50".

No evidence of what was actually on the stakes has been produced here at this trial. I must assume, therefore, that the writing on the stakes agreed with the writing in the declaration filed in the Recorder's office.

I have come to the conclusion that this discrepancy is of a character calculated to mislead.

The number two stake as recorded would be a third of a mile away from the number two stake actually staked and almost at right angles to it.

Coming now to the second ground. The Colonial number one is some 290 feet in on the Chicago Crown-granted land. Travelling from the number one post of the Colonial the next 290 feet is on the Chicago; the next 109 feet is on the Colonial ground; the next 642 feet is across the Freddie Lee, Crown granted in August, 1894, and the next 60 feet is on the Joker ground, and the balance, 350, on

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vacant Crown land. I state these figures because I think the whole pinch of this case depends on this one point.

It has been the practice to recognize as good locating the planting of the number one post on occupied land. I am not aware that the matter has ever been raised before in Court, but for years that has been accepted as good locating, and it seems to me that to expect anything else—to hold that it was bad locating would be unreasonable.

It is unreasonable to expect a miner to get on unoccupied ground before he plants his stakes. It is impossible for him to do that, having regard to the conditions in a great many cases. I have not been shown any case that says this would be a bad location, and on the other hand I have not been shown any case in which it would be declared a good location.

I have arrived at the conclusion that sub-section (*g*) is the saving clause that cured that—that will cure that. I find as a fact that the locator had actually discovered mineral in place; that there was a *bona fide* attempt on his part to comply with the provisions of the Act, and this blunder—if it is a blunder—is not of a character calculated to mislead other persons desiring to locate claims in that vicinity.

Argument.

Now then, as to the Wild Rose, located on the fourth day of September, 1902. I find it was duly located and mineral in place discovered. If the ground was already occupied by the Colonial it can take nothing.

In the course of his argument Mr. *Macdonald* referred to the No. 1, of the Cody, being on the Freddie Lee, and drew a distinction between a fractional and a full claim. In view of what I have said that is not necessary for me to discuss further; nor need I discuss at length Docksteader's statement; or the statement made by the two Docksteaders, that Callahan was in 1896 working on the Chicago ground as part of the Cody fraction. It is sufficient for me to say now that part of their case involves a charge against Callahan. To support a charge of fraud* there must be very strong evidence, and I am not satisfied that they have made that charge out. I don't wish to say anything further on that. Now, Mr. *Taylor,* that being so, shouldn't the costs of that issue be charged to you? Charged to the Docksteaders?

Taylor, K.C.: Well, one reason why not is that your Lordship has not found it necessary to go into that to the fullest extent.

Per CURIAM:—I have gone into it as fully as is necessary.

Taylor, K.C.: In the next place it is not a charge of fraud against the defendant Clark, it is simply one link in the chain to show that

* See *British Lion Gold Mining Co.* v. *Creamer, ante,* p. 51, at s. 2.

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Callahan actually did stake as he swears he staked. Now that is one reason why we should not have to pay the costs.

Per CURIAM:—I think that is right. I will not trouble you any more; there is no charge against Clark of fraud.

Judgment at trial.

Judgment will be then that the Colonial is a valid location; the Wild Rose an invalid location. The Wild Rose owners will have to pay the costs.

Judgment accordingly.

Appeal to FULL COURT.

The defendant appealed and the appeal came on to be argued at Vancouver before HUNTER, C.J., MARTIN and DUFF, JJ.

Argument.

Davis, K.C., for appellant: The Colonial is bad on four grounds: (1) because it is an over-location of the Cody Fraction, which was then a valid location, and the error in the approximate compass bearing was one which should have been remedied by sub-sec. (*g*) as it was not misleading; (2) because it was an over-location of the Chicago Mineral Claim, then being a valid location and Crown granted; (3) because the Colonial location line is defective because it runs through and across other existing valid locations, viz., the Chicago and the Freddie Lee, also Crown granted. The above defects (2 and 3) cannot be cured by sub-sec. (g). And (4) the location of the Colonial was not made by the locator in person but by an agent, which is not permitted by the Act.

[*Per* MARTIN, J.:—That last objection is not tenable. It has been the practice for many years to my personal knowledge, from cases actually tried before me, and never been questioned. And further, it is now expressly recognized by Statute, sub-sec. (*c*), sec. 16, and form S., wherein it is stated in the note "This declaration may be made by an agent."]

Davis, K.C.: I was not aware of those provisions, and so withdraw this ground of appeal.

Then as to the initial post. Sections 12 and 15 of the Mineral Act show the only ground upon which the locator can enter to place his posts in the manner directed by sec. 16, and any other method of procedure is contrary to the Act, all the provisions of which in regard to location have been repeatedly held by this Court and the Supreme Court of Canada to be imperative: see *Manley* v. *Collom* (1902), 1 M. M. C. 487; 32 S. C. 371; 8 B. C. 153; and list of cases on fatal defects given at p. 504, in 1 M. M. C. It was decided by the Supreme Court in *Connell* v. *Madden* (1899), 1 M. M. C. 359, 30 S. C. 109; 6 B. C. 76, 531, affirming this Court, that the initial post is the root of the location, and if the root of the claim is invalid the rest of it is likewise so. There is no difference in principle between

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a root of title originating in foreign soil and in a trespass. In the case of fractional claims, sub-sec. (*f*) of sec. 16, it was necessary to specially provide that they should not be invalidated by reason of the posts being on existing locations; and here the discovery post also was on Colonial ground. The curative provisions of sub-sec. (*g*) do not apply to the case of the initial post because it is restricted to "the foregoing provisions of this section;" but what we complain of is a graver defect outside of that section and originating in secs. 12 and 15. Though this is a post *de facto* it is not one *de jure* because the antecedent provisions of sec. 12 have not been complied with. There is no excuse here for non-compliance because the Chicago was a recently surveyed claim, and there was gross carelessness or worse on the part of the locator of the Colonial. To locate on a surveyed claim is of itself a misleading act. As to the location line, that is clearly bad and misleading, and worse than was held in *Dart* v. *St. Keverne Ming. Co., Ltd.* (1899), 1 M. M. C. 161; 7 B. C. 56. On the whole facts, and in the light of the surrounding circumstances the location of the Colonial was a misleading one as the evidence shows. Counsel here reviews evidence.

Argument.

S. S. Taylor, K.C.:—The principle of construction of the Mineral Act, as it now exists, is to be found in sub-sec. (*g*), and we have a finding in our favour on the facts and no good reason shown for disturbing it on the evidence. (Counsel here reviews evidence.) Section 16 can be invoked because it is only that section which requires any posts at all to be erected. We have made a discovery of mineral and that is the great point in our favour. It would be a great hardship in a rough and rugged country like this if a locator were to be responsible for a mistake of a few inches. It is no objection to the location line that it is partly on other ground and the excess if necessary may be rejected: *Doe* v. *Tyley* (1887), 14 Pac. Rep. 375; *West Granite Mountain Min. Co.* v. *Granite Mountain Min. Co.* (1888), 17 Pac. Rep. 547; Lindley on Mines, 2 Ed. 336, par. 363*a*, and see the cases cited by that author. For provisions of U. S. Federal Act, see sec. 2324, pp. 1651-2. As to the Cody Fraction we have a finding in our favour that on the facts the error in the compass bearing was calculated to mislead and we rely on it. This is a greater error than that in *Callahan* v. *Coplen* (1900), 1 M. M. C. 348; 30 S. C. 555; 6 B. C. 523; 7 B. C. 422; or *Manley* v. *Collom, supra;* and the Cody Fraction is also bad because of the misleading description on the posts and on the plan on the back of the record, for the Statute requires "as full a description as possible," in the location of fractional claims.

Davis, K.C., in reply. Though sec. 16 is the only one which requires posts to be put up it contemplates such posts only as are placed within the area prescribed by the previous section, and sec. 16 is only

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the machinery for marking on the ground the areas allotted by the previous sections. Properly speaking, there can be no mineral claim outside of such prescribed area. No answer has been even attempted to the principle laid down in *Connell* v. *Madden* that the initial post is the root of title, and the American cases are misleading on this point, for they depend upon other principles and particular statutes.

Cur. adv. vult.

November 22nd, 1904.

Judgment.

HUNTER, C.J.:—This is an adverse action, the decision of which depends on the validity of the Colonial mineral claim.

The No. 1 post of this claim, which was located as a full-sized claim, was admittedly placed on the Chicago, for which the Crown grant had already issued, about 290 feet from the western boundary of that claim. Starting then at No. 1 post the Colonial location line traverses the Chicago for a distance of 290 feet; proceeds thence northwesterly for 109.6 feet until it crosses the boundary of the Freddie Lee, another Crown granted claim; thence across this claim for about 640 feet; thence about 460 feet to the No. 2 post.

Two principal points were taken in support of the attack on this location. The first was that the location of the No. 1 post on ground not open to location at a distance of 290 feet from the boundary of a surveyed claim is necessarily calculated to mislead other prospectors, and therefore not within the saving powers of sub-section (*g*) of section 16.

The question as to whether a deviation from any of the directions contained in section 16 is calculated to mislead is obviously one of fact depending on the nature of the *locus in quo;* and the learned trial Judge after hearing all that was urged came to the conclusion that the position of the No. 1 post was not calculated to mislead. It has not been shewn to us that in this he was clearly wrong, and therefore the finding cannot be disturbed.

The other point is that as No. 1 post was placed on ground not open to location the claim is void.

It is first necessary to consider what the law was before the insertion of sub-section (*f*) in section 16 by the Act of 1898, and then what was intended by that sub-section.

There were frequent changes enacted in the requirements providing for the mode in which quartz or lode claims were to be taken up or located, until in 1892 the mode of locating by means of two posts was prescribed, and this has continued down to the present time with some immaterial variations in the details. Now, it is clear that from a very early period in the history of lode mining the Legislature

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never regarded it as necessarily invalidating a location that it should in part overlap a previous location and, so far as I am aware, this view has always been acted on by the Land office in issuing Crown grants. Section 48 of the Act of 1891 (passed when lode mining was in its infancy, and being the first statute to deal specially with lode claims), enacted that "if an adverse claim shall only affect a portion of the ground for which a certificate of improvements is applied the boundaries of such portion shall be shewn by a plat of the entire adverse claim, and the applicant may relinquish the portion covered by the adverse claim and still be entitled to a certificate of improvements for the undisputed remainder of his claim upon complying with the requirements of this Act." This section, the germ of which may perhaps be discovered in the words "or such portion thereof as the applicant shall . . . appear to rightly possess" in section 83 of the Consolidated Act of 1888, does not *ex facie* limit the right of the applicant to those cases where, if he is the subsequent locator, his posts and his location line are placed outside of an elder location, and there is no reason for supposing that the right was intended to be so limited. On the contrary, the evidence is strong to shew that the intention was the other way, as in 1896, the affidavit, which by that law was first required to be made by the locator to obtain his record, and which is still required, contains a positive statement that he has discovered mineral in place; but, on the other hand, only avers that to the best of his knowledge and belief the ground comprised within his claim is unoccupied by any other person as a mineral claim; and in section 15 of the Act of 1898, the section appears re-drafted in the following more sweeping and explicit terms:

> "If an adverse claim shall only affect a portion of the ground for which a certificate of improvements is applied the applicant shall nevertheless be entitled to a certificate of improvements for the undisputed remainder of his claim upon complying with the requirements of this Act."

I think that the course of the legislation as thus developed shews that the Legislature was fully cognizant of the difficulties which surround the proper and accurate staking of a claim in rugged and densely wooded districts, where indeed mineral in place is mostly found, and intended to make every allowance for it. The locator is and always has been entitled to measure his claim horizontally, irrespective of the irregularities of the ground. Now, suppose a prospector locating a claim on a 45 degree slope. He would be entitled if placing his posts up and down the slope to put No. 2 not 1,500 feet away from No. 1, but 2,121.32 feet, and the steeper the slope the greater the distance to which up and down the slope he would be entitled measured upon the ground. How is the man who follows, and finds, say, 2,500 feet between the two posts and judges that to be too great a distance having regard to the slope, going to be able to

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tell with anything approaching accuracy where the other's No. 2 ought to be? He does not wish of course to go on ground which is not open to him, but neither does he wish to leave any ground untaken next to the former location. So also the distance claimed to the right or left of the location line is measured horizontally. Suppose the location notice claims 750 feet to the left which is a steep downward slope. How is the man who wishes to locate alongside going to tell what measurement on the ground would represent this 750 feet unless he was a surveyor and had the instruments? I think the argument is altogether too bold which admits that the Legislature gives a man on condition of paying a special fee the privilege of locating a mineral claim but at the peril of finding that his time and money have gone for nothing, because he may have mistaken the limits of his neighbour's claim, and inadvertently set one of his location posts perhaps only a few inches on the wrong side of the boundary. The argument that because a post happens to be set in ground already duly located or Crown granted, the claim is void as founded on trespass, is feeble. In the first place, all that the locator obtains on the completion of his title is a grant of the mineral in fee with the right to use the surface and timber thereon only for the purpose of winning the mineral—he does not get the fee simple—and therefore there is no trespass except so far as his limited right to use the surface has been interfered with, and while no doubt the assertion of the claim on No. 1, if set on close ground, savours of trespass, no real injury is done unless and until the other's right to win the mineral is interfered with or his title questioned by the trespasser applying for a certificate of improvements. Then again on what principle can C complain that B's claim is void as founded on trespass against A? If A does not complain about B's post being on his ground, what concern is it of C's? If B's No. 1 post is put for his convenience a few inches over A's line with A's leave, why should C interfere? Then on what principle is C's right to locate to be dependent on whether or not A gave B leave so to set his post or condoned the inadvertence?

At the same time no doubt the Legislature does not sanction the idea of jumping or of interfering with the locations of others, or of making pretended locations. Therefore it was necessary to provide an irreducible minimum to constitute a valid location. What is this irreducible minimum? I do not think it is constant but varies, and was intended to vary with the local circumstances, and that it is indicated in sub-section (*g*). The effect of that sub-section is that a free miner's location is good if (1) he has discovered mineral in place; (2) if he has *bona fide* tried to comply with the provisions as to marking and describing the claim; and (3) that his non-compliance (if any) was not calculated to mislead other persons seeking to locate in the vicinity. For example, while ordinarily a claim which

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had not been marked by a No. 1 and No. 2 post would be void, a case might easily happen where it would not be so. Suppose a prospector desires to locate ground near a chasm. He puts in No. 1 post at 1,000 feet distant from the edge. What is there in the Act which compels him, or was intended to compel him, to abandon that portion of the mineral, if any, situate beneath the chasm? Why should not his claim be good if his notice claims 1,500 feet from his No. 1 and he clearly marks his location line to the brink and states the direction of such line on his No. 1 post? What more could he do? Again, suppose he is in a locality where no timber is available out of which he can obtain posts which will face four inches square, but only three inches square. Would it not be against the spirit of the Act to hold a claim so staked in such a locality to be void? The fact is that sub-section (g) is an emphatic affirmation of the truth that the grand equity belongs to the discoverer who is first upon the ground and makes an honest attempt to comply with the Act and does nothing likely to mislead other prospectors, and that all other considerations so far as concerns the actual locating are of minor importance.

But then it was urged that as sub-section (*f*), which was introduced in 1898, expressly provides that a fractional claim shall not be invalid by reason of a post being on a previously located unsurveyed claim, the whole question was necessarily brought to the attention of the Legislature, and that it has chosen to excuse the setting up of posts only in unsurveyed claims and only when fractions are being located. This argument looks more formidable than it really is as it amounts to nothing more than an attempt to apply the maxim *Expressio unius est exclusio alterius.* The treacherous nature of this maxim has often been pointed out and for my part I think that the so called "*exclusio*" very often exists rather in the imagination of the learned counsel who is called upon to expound the statute (in this case an amending Act) than in that of the draughtsman who drew it or of the Legislature which passed it.

In *London Joint Stock Bank* v. *Mayor of London* (1875), 1 C. P. D. 1 at p. 17, Lord Coleridge, speaking for himself and Brett, Grove and Lindley, JJ., says:

> "The general principle that *Expressio unius est exclusio alterius* cannot indeed be questioned; but it applies with a force differing in different cases; and in this instance it seems much more reasonable to hold that the two great corporations above mentioned prevailed upon Parliament to prevent all questions as to themselves by direct enactment, than to hold that Parliament by such special enactment in these two cases meant to determine this question in all other cases adversely to corporations."

Chitty, L.J., says in *Thames Conservators* v. *Smeed, Dean & Co.* (1897), 2 Q. B. 334, at p. 351:

> "To an Act, drawn as this is, I think it would be dangerous to apply the rule of *expressum facit cessare tacitum.* I decline to draw the inference that

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because shores are mentiond in (*d*) they are excluded from (*a*), (*b*), and (*c*)."

Lord Campbell says in *Bostock* v. *North Staffordshire Railway* (1855), 4 El. & Bl. 798, at p. 832:

"Much stress was laid upon prohibitions to do specific acts, which would amount to the use of the land for a different purpose from that of feeding the canal. But I do not think that the express prohibition to do these acts amounts to a cancelling of the restriction, or has the effect of confining it to the Acts expressly prohibited. The express prohibition may be *ex abundanti cautela*. . . . . In construing instruments so loosely drawn as these local Acts, we can hardly apply such maxims as that 'the expression of one thing is the exclusion of another,' or that 'the exception proves the rule.'"

If it needs any demonstration to shew that this Act is one of the most ill-drafted pieces of legislation to be found in the whole Statute book, I need only refer to some sections which more or less overlap each other, *e.g.*, sections 50 and 130, 53 and 147, 134 and 139, section 16 sub-section (*h*) and 143. Indeed, section 16 itself as finally revised in 1898 is not a model of careful draughtsmanship. How, for instance, can the provisions of sub-section (*g*) apply to sub-sections (*b*), (*e*) and (*f*)? Again, the section provides that all the particulars required to be put on the posts shall form part of the record, but the form of record given by the Act makes no provision for the insertion of such particulars. I therefore think that we would be falling into serious error if we were to hold that the inference which is plainly deducible from the unfettered terms of section 47, which as already stated first appeared in 1891, and from the form of the affidavit leading to the record which was first required in 1896, and from sub-section (g) first enacted in 1896, was impliedly nullified by the insertion of this sub-section (*f*) passed in 1898, and that the true view is that this sub-section was enacted rather for the purpose of expressly encouraging the taking up of all available fragmentary parcels of mining ground as fractional claims in order to avoid small gores and angles, and the consequent expense of unnecessary surveys, than for the purpose of discouraging and handicapping the taking up of full sized claims, which section 15 expressly invites to be taken up wherever possible, and the maxim *abundans cautela non nocet* applies to the case rather than the one in question.

Then it was said that this question has in effect been settled in favour of the appellant by *Manley* v. *Collom* (1902), 32 S. C. R. 371; but according to *Quinn* v. *Leathem* (1901), A. C. 495 and numerous other authorities, a case is authority only for the points actually decided, and the only passage that I can find which might be construed to have any bearing on the matter is the statement that the prospector must beware of staking on ground already staked, but which I take to mean merely that if a man stakes over such ground, he will, generally speaking, take nothing by the proceeding.

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Lastly, regard should be had to the consequence of a decision that the placing of No. 1 or No. 2 on ground not open to location, *ipso facto*, avoids the claims. Such a decision would no doubt destroy a large number of claims located in good faith and on which much time and money have been expended, and would be a direct invitation to that class of ghouls known as "jumpers" to rob others of the fruits of their lawful enterprise and toil under the mask of law.

For these reasons I think the judgment should be affirmed.

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MARTIN, J.:—Both the conflicting claims in this adverse action, *i.e.*, the Colonial and the Wild Rose Fraction, are substantially overlocations of the Cody Fractional mineral claim which was located and recorded on the 3rd of August, 1896. The Colonial is the senior location, having been located on the 7th of October, 1900, and recorded on the following day; the Wild Rose Fraction was not located till the 4th of September, 1902, and was recorded on the same day.

Unless the Wild Rose Fraction is invalid because of its conflicting with the Colonial it is otherwise a valid location.

In order to clear the ground it will be necessary to decide the question as to whether or no the Cody Fraction was a valid location at the time the Colonial was located thereupon. On this point I have no difficulty in accepting the finding of fact of the learned trial Judge that on the evidence the grave error in the compass bearing was of a character calculated to mislead other persons desiring to locate claims in the vicinity. The consequence is that the Cody Fraction was an invalid location at the time the Colonial was located over it, and therefore on that ground the Colonial is not open to attack.

The second ground upon which the Colonial is sought to be declared invalid is that its initial post is placed 290 feet within the ground of the Chicago mineral claim, then a valid location and to which a Crown grant had been issued on the 23rd day of July previous.

This raises definitely for the first time, so far as now known, the important question as to whether or no a location is invalid solely because its initial post has been placed upon the ground of an existing valid location.

Before considering the matter from a purely legal standpoint, there is a remark in the judgment of the learned trial Judge which the appellant submits should not receive the sanction of this Court, *viz.*:

> "It has been the practice to recognize as good locating the planting of the number one post on occupied land. I am not aware that the matter has ever been raised before in Court, but for years that has been accepted as good locating, and it seems to me that to expect anything else—to hold that it was bad locating—would be unreasonable."

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It is contended that as there is no evidence of the existence of any such practice among free miners, it should not be relied upon, because, assuming it existed, their opinions and actions are outside the record; and, further, that as a fact there is no such practice, and the danger of placing an initial post on another valid location has been so well recognized that it is never knowingly done, and when inadvertently done, not relied upon, which would account for the point never having been decided before in this Court.

Seeing that there is no evidence of the alleged practice having received any judicial or statutory sanction, or even having been recognized by free miners, it would in most cases be unnecessary to consider his Lordship's remarks, but this being a point of unusual importance and far-reaching effect which may come before a higher tribunal outside this Province, it seems desirable as a matter of precaution to state that I, as one member of this Court, have never heard till this appeal of the alleged practice of its being "accepted as good locating" either by lawyers or others having a knowledge of mining matters; for years I have understood the point to be a moot one with the better opinion being against the validity of such a location. Indeed, six years ago the objection was raised before Mr. Justice WALKEM, in *Connell* v. *Madden* (1899), 6 B. C. 531, 1 M. M. C. 359, against the plaintiff's mineral claim, the Boundary No. 2, but not decided because the Good Enough claim was not shewn to be a valid location. Consequently, with every respect, I beg to differ from the view of the practice expressed by the learned Judge.

Turning then to the cases and authorities cited, I remark, first, that there was some reference to American decisions on the location of lode claims during the argument, and to ascertain their application to the point in question I have at some length considered them, and others, and the statutes on which they are based. These statutes, of the various mining States, will be conveniently found in Lindley on Mines, 2nd Ed., par. 374. The requirements of some of them are very precise, noticeably North Dakota, and their object is to supplement the vague Federal Statute, for, as regards acts of defining the location, all it requires (Sec. 2,324) is that the "location must be distinctly marked on the ground so that its boundaries can be readily traced": Lindley, pars. 371, 373; Bar. & Adams, pp. 227-34, 798. In not one of these statutes are the provisions for location so similar to ours that a case decided on them would be of any safe guidance whatever in the construction of our own statute on the present question. It is noticeable that, with one exception, they all require corner posts to define the location, but there is now nothing of the kind in our statutes, though there formerly was—Goldfields Act, 1859, Rule 2, 1 M. M. C. p. 547; and even so late as the Mineral Act Amendment Act, 1893, sec. 15, corner posts were again required, in addition

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to the others, but were abolished next year. Indeed, that in some States even after location the boundaries may be changed appears by the case of *Shreve* v. *Copper Bell Min. Co.* (1891), 28 Pac. 315 at p. 316, wherein the Supreme Court of Montana held as follows:

"The discoverers do not usually make an accurate survey of the premises; and the notices of location contain a description in general terms and by name. When the true course of the vein has been ascertained by development, the boundaries are sometimes changed to protect the interests of the claimants. The owners of the Edna lode mining claim availed themselves of this privilege, which is valid under certain conditions."

In the United States discovery is that which is primarily relied upon in establishing title, and as is stated in Lindley, *supra,* 330:

'It has been frequently held that discovery is the source of the miner's title."

Thus, *e.g.,* the Supreme Court of Colorado, in *Beals* v. *Cone* (1900), 62 Pac. 948 at p. 952, has laid it down that—

"It is upon that act (discovery) that the very life of a mineral location depends."

There is, fortunately, no doubt about what is the root of title to a lode claim under our distinctive Act. That point has been settled by this Court in *Connell* v. *Madden, supra,* wherein it was clearly laid down that the claim "takes its root" in its initial post. This decision was affirmed by the Supreme Court of Canada and so it stands as the law on the subject, and I may say that there is nothing in the argument in the case at bar which would cause me to alter the opinion I expressed in *Connell* v. *Madden,* even were it open to me to do so.

But, despite that decision, it was argued that there is no peculiar virtue in the initial post and that all that was said in regard to it might as well apply to the No. 2 post. I am unable to take this view for many reasons, chief among which is that the statute itself has created several marked distinctions. I refer, first, to the prohibition in section 16 which says:

"It shall not be lawful to move No. 1 post, but No. 2 post may be moved by the Provincial Land Surveyor when the distance between Nos. 1 and 2 posts exceeds 1,500 feet in order to place No. 2 post 1,500 feet from No. 1 post on the line of location. When the distance between posts Nos. 1 and 2 is less than 1,500 feet the Provincial Land Surveyor has no authority to extend the claim beyond No. 2."

There is a penalty of fine or imprisonment, or both, for contravention of this provision, section 136, and section 16 of the Mineral Act Amendment Act, 1898, and it shews the importance attached to the fixity of the initial post which, as the very beginning and foundation of location, must, under all circumstances, even when being surveyed for a Crown grant, stand as originally placed. Second, it is now by reference to it only that the width and boundaries of the claim

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and the compass bearing of the location line, which is defined as being the "straight line between posts numbers one and two," can be ascertained, for upon it those particulars are directed to be placed. Third, the statute does not merely refer to it as the No. 1 post, in the same way as it does the No. 2 post, but also gives it a name, the "Initial Post," which is directed to be written on it, so that all may know it is the beginning, *i.e.*, the initiation of the location. This designation was first given to it by the Mineral Act Amendment Act, 1892, and is important because theretofore the claim was marked by three posts down the centre line, all of which had the same information on them and none could be moved—Mineral Act, 1891, sec. 15. But in the Amendment of 1892 this was changed to two posts only, the Initial Post, so first named, and the No. 2, and the present distinctive information was directed to be written on the Initial Post alone and leave first given for the surveyor to move No. 2. It is true that the discovery post is also given a name, but it is the creation and innovation of a later statute, the Mineral Act Amendment Act, 1893, sec. 3, and is of a different class from Nos. 1 and 2 and has nothing to do with the actual location in the strict sense of that term, *i.e.*, the mere marking out and defining the limits of the claim on the ground. This, indeed, clearly appears from the statute itself, for the provision requiring the erection of a discovery post comes after that which requires the location line to be marked, and this cannot be done till after Nos. 1 and 2 posts are erected. The section says: "When a claim has been located, the holder shall immediately mark the line, etc." "When" here can, and in view of the history of the legislation, does only mean "after," and assumes that at that time the physical act of location in the limited sense above mentioned, has been accomplished, which of course was the case before discovery posts were thought of. And hence it is significant, but not strange, that the reference is now for the first time to the "holder" of the claim, instead of "free-miner" or "locator." Nor is it even necessary that the discovery post should be "as near as possible on the line of the ledge or vein" as the other posts must be, but merely "at the point where he (locator) has found rock in place." By the above observations I do not wish it to be understood that I regard the provisions relating to marking the location line and placing the discovery post as being any less imperative than any other; they are all equally open to attack by one having an adverse right, who may set up the various objections contemplated by section 131, as follows:

"If any person shall in any suit or matter claim an adverse right of any kind to the mineral claim comprised in any record, or to any part thereof, or shall claim that any record is invalid or has been improperly obtained, or that the holder thereof has not complied with the provisions of the Act under which the location and record were made, or has not prior to the obtaining of such record made a good and valid location of such mineral claim according to law, the onus of proof thereof shall be on the person so claiming

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an adverse right, or so claiming that such record is invalid and has been improperly obtained as aforesaid, and in default of such proof judgment shall be given for the holder of such prior record in so far as such action, suit or matter relates to any of the matters aforesaid."

And section 27 is to a similar effect:

"In case of any dispute as to the location of a mineral claim the title to the claim shall be recognized according to the priority of such location, subject to any question as to the validity of the record itself, and subject, further, to the free miner having complied with all the terms and conditions of this Act."

When using the word in its broad sense, that in which it is generally employed by miners, the "location" is not now deemed to be complete till after the location line has been marked and the discovery post erected.

Bearing in mind the three foregoing statutory distinctions of the Initial Post, it is, in my opinion, impossible to even plausibly contend that the No. 2 post is of like consequence; and I can well understand that much may be said in favour of the validity of an otherwise valid location the objection to which is that its No. 2 post has inadvertently been erected upon an existing valid claim. The statute itself, for example, shews that being wrongfully placed by reason of excess of length in the location line is not a ground for invalidation; in other words, that surplusage may be rejected.

I pass then to the area open to location. By sections 12 and 15 a free miner seeking to locate a lode claim upon Crown lands cannot enter or locate upon "any land lawfully occupied for mining purposes other than placer mining." Nevertheless that is what the locators of the Colonial did when they encroached upon the Chicago ground and placed their initial post thereon, and the writing upon it was public notice that the owners of the Colonial claim sought to appropriate to themselves a large portion of the "land lawfully occupied for mining purposes" by the Chicago claim. The contention is that the initial post so placed is of no effect and cannot be regarded as one *de jure* though it is one *de facto,* and that there consequently, in a legal sense, is not now, and never was any foundation for the claim called the Colonial, and that the result is really the same as in *Connell* v. *Madden.*

There are two provisions in section 16 regarding the position of the posts which deserve attention. The first is as follows:

"But in case either No. 1 or No. 2 post be on the boundary line of a previously located claim, which boundary line is not at right angles to said location line, the Provincial Land Surveyor shall include the fraction so created within the claim being surveyed; provided always, that the whole claim does not exceed an area of 51.65 acres."

This deals with the case of the posts of a full sized claim being placed on a boundary line of an existing adjoining claim, and there

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is consequently a common boundary line (section 15). It is significant that while the Legislature is so careful to provide for such a situation it does not safeguard the case of the posts being within the boundary line of an existing claim. A not strained inference is that the Legislature did not intend to protect a careless locator in such circumstances. This is made more plain by reference to sub-section (*f*), which, in dealing with the more difficult question of the location of fractional claims, provides that the location of such

> "Shall not be invalid by reason of the location posts of the fractional mineral claim being on such previously located mineral claims, and the owner of such fractional mineral claim may, by obtaining the permission of the Gold Commissioner of the district, move the posts of the fractional mineral claim and place them on the surveyed line of the adjoining previously located mineral claims."

But be it noted that the remedial effect of this sub-section can only be invoked when the fractional claim "has been located between previously located and unsurveyed mineral claims." If the locator of a fraction places his posts on an existing surveyed claim, which doubtless means the survey for a certificate of improvements mentioned in section 36 (*b*), he must abide by the consequences of his error, and this despite the fact that sub-section (*d*) recognizes the difficulties of location of a fractional claim to such an extent that it is only required to be "marked by two legal posts placed as near as possible on the line of the previously located mineral claims," instead of "as near as possible on the line of the ledge or vein" as in the case of full claims.

While I agree with my Lord that the maxim *expressio unius est exclusio alterius* should not be pushed to undue lengths, yet in proper cases it admittedly has force and application as is even shewn by the decisions he cites relating to the special exemptions of certain corporations. In my opinion if it is to have any force at all it should have it in the case of a public statute of far-reaching effect, such as the Mineral Act, and particularly where the section (16) thereof in question is one which relieves prospectors from the consequences of failure to conform to the imperative requirements of an immediately preceding section, 15. Such a situation nearly approximates the case of *Hamilton* v. *Baker* (1889), 14 App. Cas. 209, on the Merchant Shipping Act, wherein Lord Watson, at p. 217, says:

> "When a variety of personal and unsecured claims are dealt with in a single clause, and it is expressly declared that one of them shall bear a lien, there arises a strong presumption that a similar privilege is not to attach to the rest; and that presumption cannot be overcome except by very plain implication."

On this point of forbidding the encroachment of a new location upon an existing one the Act is specific and imperative. Section 15 is declaratory of the right of a free miner to make a location, yet also

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declares that right to be "subject to the provisions of this Act with respect to land which may be used for mining," and it provides (*c*) that

"No mineral claim of the full size shall be recorded without the application being accompanied by an affidavit or solemn declaration in the Form S, made by the applicant or some person on his behalf cognizant of the facts: That the legal notices and posts have been put up; that mineral has been found in place on the claim proposed to be recorded; that the ground applied for is unoccupied by any other person as a mineral claim. . . ."

Before, therefore, a locator undertakes to make the required affidavit he should examine the neighborhood carefully, for a record obtained on a misrepresentation of fact is one which has been "improperly obtained" and invalid within the meaning of section 131; and it is also contrary to section 27 above quoted.

It is now beyond question that all the conditions of the Act which govern location are imperative, and that a location in which they are lacking is invalid when in conflict with the rights of free miners lawfully exercised, unless the defect is cured by the remedial sections, and there is a long line of reported cases to that effect beginning with *Atkins* v. *Coy*, (1896), 5 B. C. 6, 1 M. M. C. 88, and ending with the decision of the Supreme Court in *Manley* v. *Collom* (1902), 8 B. C. 153, 1 M. M. C. 487; in the note to which latter case a list of them is given, p. 504. Speaking of section 10 of the Mineral Act of 1891, and section 9 of the Mineral Act Amendment Act of 1892, which correspond to the present sections 12 and 27, it was said in this Full Court in *Atkins* v. *Coy*, by Mr. Justice MCCREIGHT, that they

"give no encouragement to locate on land lawfully occupied for mining purposes, but, on the contrary, practically prohibit it. In short, I do not think sec. 9 of the Mineral Act (1891) Amendment Act, 1892, was intended to encourage one miner to trespass on the location of another; in other words, to do what may be known, perhaps questionably in forensic language, as 'jumping.' I gather the meaning of the Legislature to be that there shall be a good location not obtained of course by trespass (see sec. 10 of the Mineral Act, 1891), and a good record, made of course within the time required by law."

The general principle is that where a statute creates a system of licences and the machinery to carry it into effect its provisions must be complied with: *Newfoundland Steam Whaling Co.* v. *Government of Newfoundland* (1904), A. C. 399, 403, and, indeed, as I noted the argument, it was conceded that the situation of the Initial Post invalidated the location unless sub-section (*g*) could be invoked, and it was claimed that it did apply to cure the defect. It does apply if the defect is one which is caused by a "failure on the part of the locator . . . to comply with the foregoing provisions of this section" (16), but not otherwise. It must be remembered that there are omissions and mistakes before and after location which it does not even purport to cure. I refer to one, which is of the first import-

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ance, namely, the failure to record within the time limited by section 19. No one has ever questioned that this is an imperative provision and that failure to comply with it is followed by the loss of the claim; that has been to my knowledge conceded in open Court as beyond question, quite apart from the decision in *Francoeur* v. *English* (1897), 6 B. C. 63, 1 M. M. C. 203. And yet it might be argued that it is a great hardship that a prospector should lose his claim because he was delayed an hour by a swollen river or met with an accident in the mountains on his way to the Recorder's office. But the Legislature has not yet seen fit to come to the miner's relief in such a notorious instance, though it has done so where the miner records in the wrong office (section 22). The relaxing of the rigour of the old restrictions has only been gradual; some of the chief instances are mentioned by Mr. Justice WALKEM in *Peters* v. *Sampson* (1898), 6 B. C. 405 at p. 411, 1 M. M. C. 252. Those which have not been modified must be construed as strictly as before.

Here, the objection is not to the post itself, which is only rendered necessary by section 16 and not by sections 12 or 15, but to the land in which it is placed; in other words, that it stands within a prescribed and consequently unlawful area where it is legally impossible to erect one.

The question thus depends upon the true construction of sections 12, 15 and 16. I take the meaning of the expression "locate" a mineral claim in sections 12 and 15 to be that out of any lands available for mining purposes the free miner may appropriate to himself for such purposes a plot of ground of the size and shape specified in section 15. Having obtained that right under those sections, he must to give effect to it resort to section 16 which alone specifies the manner in which the physical act of marking out his appropriation called location, of the "plot of ground" conferred upon him by section 15 shall be performed. These sections not only do not clash, but the last implements the two preceding, and provides the only machinery for acquiring the right they confer. But he can only resort to section 16 for the purpose of employing it to obtain a location within the area prescribed by sections 12 and 15; in other words, the machinery of that section can only be employed in the furtherance of a lawful purpose and not to aid a trespass upon the prior segregated areas of other licencees of the Crown. And if he make a mistake in his choice of the area open to him under sections 12 and 15 I am unable to see how he can summon to his aid a section which does not relate to the selection of areas. There is to my mind a clear line of demarcation between the declaratory and operative sections, if I may so term them; and no principle of law has been suggested which

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would warrant us in holding that a prospector may in defiance of the statute invade the proscribed area and then shield himself from the consequences of his unlawful acts therein committed by invoking a section which pre-supposes a lawful entry upon unoccupied Crown lands.

After a full consideration of the matter, the only conclusion I can come to consistent with the Act and decisions thereon, is that the placing of an initial post within the boundaries of an existing valid location is an illegal act contrary to both the letter and spirit of the Mineral Acts, and that a location so-called which has its initial post so placed has no root of title and never was and never can become a valid location; and that sub-section (*g*) cannot be invoked to cure an imperfection in a location which was one in name only and not in law nor in fact.

Much was said on both sides as to the hardship that would result from our decision whichever way it went, and there is not a little to be said from both points of view, *e.g.*, on the one hand it is urged that it would be a hard thing if a miner were to lose his claim because he had inadvertently placed his initial post a foot over the boundary; and on the other hand that constant annoyance and embarrassment would result to a valid locator if even after survey of his claim and Crown grant thereof, as in the present case, he was never to be free from adverse locators and the necessity of being drawn into litigation with those who designedly or inadvertently trespassed upon and sought to appropriate a portion of his ground by planting posts thereon with notices advancing claims of ownership which it would be dangerous to ignore, and that for the Court to countenance such practices, whether arising from carelessness or design, would be to put a premium on confusion and discord, if not worse.

"Between these conflicting views," to adopt the language of the House of Lords in *Hamilton* v. *Baker, supra,* p. 227, "I do not venture to express any opinion. I have only to state what in my judgment the law really is. It is for the Legislature to alter the law if Parliament in its wisdom thinks an alteration desirable." The responsibility for the legal results of the Mineral Acts rests not upon this Court, but upon the Legislature which enacted them, and that body may if it please extend the remedial section to meet such cases as this in future, and thus allow the same margin for mistakes in locating full claims as in fractions. But I feel bound to say that the situation of the present plaintiff who carelessly crossed the boundary line of a recently surveyed claim, and went no less than 290 feet upon its ground before planting his post, does not appear to me to entitle him to anything like as much consideration as locators in such cases as *Pellent* v. *Almoure* (1897), 1 M. M. C. 134, who, before

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the remedial sub-section (*g*) was passed, lost their claims according to the statute because certain faces of their posts were one inch too narrow—and see also *Creelman* v. *Clarke* (1898), 1 M. M. C. 228, and *Clark* v. *Haney* (1899), 8 B. C. 130; 1 M. M. C. 281. And before that sub-section was passed locators were often placed in the unfortunate position of losing their claims even when it was physically impossible to comply with the conditions, especially in attempting to mark the location line, or, as it was first called, the centre line, which rendered it necessary to pass a special section to modify the requirements in certain cases; I refer to section 17 of the Mineral Act of 1891, now substantially section 18. The decision of this Court in *Callanan* v. *George* (1898), 8 B. C. 146, 1 M. M. C. 242, is a good illustration of what I mean. The present plaintiff must be presumed to have known the danger, pointed in *Manley* v. *Collom*, of hastily planting posts without carefully searching for the boundaries of adjoining claims, and, as the Supreme Court said, "he must beware of staking there."

In regard to section 48 of the Mineral Act of 1891 and section 15 of the Act of 1898, which were not referred to on the argument, it seems desirable that I should give my view thereon, and it is that they are not of real assistance in determining the present point. They relate to the proceedings upon applications for a certificate of improvements (originally the application was for a Crown grant direct) and the special provisions of the procedure upon adverse claims. This is peculiar to our mining laws and was first introduced in 1884 by sections 68 and 70 of the Mineral Act of that year. Section 70 provided that after the adverse claim was filed all proceedings on the application for certificate should be "stayed until the controversy shall have been settled or decided according to law, or the adverse claim waived," and that after the judgment of the Court had been given and a copy filed with the Government agent then "a Crown grant shall issue thereon for the claim or such portion thereof as the applicant shall appear from the decision of the Court, to rightly possess." It is important to note that the only way the applicant could get rid of the adverse claim was either by getting a judgment in his favour, or by his adversary waiving it; the applicant could not avoid the serious delay caused by the stay of proceedings and the compulsory litigation by a withdrawal of a part of his application, it had to be an abandonment of all or none. This procedure was continued in the Consolidated Mineral Act of 1888 in sections 81 and 83, and it was not till 1891, by section 48, that the applicant was given relief in this respect, *i.e.*, he was then provided for the first time with the means whereby he could decline to contest with the adverse claimant the title to a disputed portion of the ground, relinquish his preten-

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sions thereto, and thereupon obtain a certificate for the unassailed balance.

This is a valuable privilege, for he may have various reasons for not wishing to enter into litigation with the adverse claimant, *e.g.*. his title to the disputed portion may be defective from causes quite outside of acts of location—a secret defect, for instance, in his paper title arising from one of many weaknesses known to conveyancers, such as an error in the record, or an outstanding interest, or a doubtful document, to draw attention to which might imperil the whole claim, and so it would be more prudent to lose a part rather than a whole. Or again, it may be that the disputed ground is of no value and not worth the trouble and expense of a law suit. In any one of these cases, or others that might be imagined, the privilege of being able to abandon is of value to him, for without it the Crown officers would be forced to take the position that before the certificate could issue he must carry on to judgment the adverse litigation begun under section 37 of the Mineral Act, which, be it noted, is not restricted to overlapping claims or to boundaries, but is "an adverse right of any kind either to the possession of the mineral claim referred to in the application for certificate of improvements or any part thereof, or to the minerals therein contained." Bearing in mind the history and object of this peculiar procedure there is nothing in any of the said sections which, in my opinion, warrants us in assuming that it was the intention of the Legislature to countenance in any way the mischievous results of the haphazard location of conflicting claims or to encourage over-lapping consequent upon failure to observe the statutory conditions. On the contrary it is clear to me, at least, that the intention was to extricate the applicant for a certificate from the awkward position in which he was often placed in attempting to comply with the sections relating to the special procedure to be followed in obtaining such certificate. Indeed, in the Act of 1884, sec. 31, when title depended upon priority of record, it was declared that titles to claims in dispute were "subject to any question as to the validity of the record itself, and subject further to the terms, conditions and privileges contained in section 27 of this Act," (relating to record); and this requirement was in 1891, when the question of title was altered to depend upon priority of location instead of record, expanded (section 18) into requiring compliance "with all the terms and conditions of this Act," and so it now stands as section 27 of the Mineral Act. It should also be borne in mind in considering the intention and application of the said adverse sections that claims have been measured horizontally since 1867 (Gold Min. Ord. 1867, sec. 57); and also that before and at the time the said adverse sections were passed, owners of lode claims possessed extra lateral rights which were productive of such endless conflicts as regards apex, boundaries

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and otherwise, that they were, without prejudice to existing rights, abolished by the Mineral Act Amendment Act of 1892, sec. 5.

Further, it is manifest that so far as concerns the exact and chief point raised in this appeal—*i.e.*, the effect of the initial post being placed on an existing valid location—none of the said adverse sections which have been considered is of any real assistance in determining the point, because at the time they were first enacted in 1884, initial posts had not been thought of, and claims were then simply marked (sections 58 and 63) by three centre posts where all were of the same kind and not distinguished by name or number, and bore the same notice.

In view of the opinion hereinbefore expressed, it is unnecessary to go into the other questions raised on the appeal; but I think it is due to the appellant to say, in case it should be held by a higher Court that sub-section (*g*) does apply, that in my opinion the very fact that an initial post was planted so far within a surveyed claim as this was would in itself be a strong piece of evidence to shew that such a location was of a nature calculated to mislead other prospectors, because unless there is evidence to the contrary, and there is none, it must be assumed that a survey made under section 36 (*c*). as this was, conformed to that section, and therefore that, as the section directs, the surveyor "accurately defined and marked the boundaries of such claim upon the ground, and indicated the corners by placing monuments or legal posts at the angles thereof. . . ." It is scarcely credible that a prospector of even slight experience would look within the boundaries of a surveyed claim for initial posts placed thereon after its location. The survey lines and the surveyor's statutory notices on the corner posts would put him off his guard and he would not expect a junior conflicting claim to emerge from that surveyed area.

The result is that the Wild Rose Fraction is declared to be a valid, and the Colonial an invalid location.

The appeal should be allowed with costs.

DUFF, J.:—I agree with my Lord.

Appeal dismissed, MARTIN, J., *dissenting.*

NOTE.—An appeal to the Supreme Court of Canada is pending. For list of fatal defects in location and operation of curative section: see Vol. I., p 504; and also *Snyder* v. *Ransom*, *ante*, p. 77; *British Lion Gold Mining Co.* v. *Creamer*, *ante*, p. 51; *Sandberg* v. *Ferguson*, *ante*, p. 165; *Tanghe* v. *Morgan*, *ante*, p. 178; and *Rutherford* v. *Morgan*, *post*, 214.

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Mineral Claim—Over-location—Defect or Irregularity in Location—Post—Location Line—Misleading—Curative Provisions of Sec. 16, and Right of Stranger to Invoke—Discovery of Mineral in Place—Government Official—Relief under Sec. 53 from Mistake of—Jury, Questions for and Charge to.

When the validity of one location depends upon the due location of another the curative provisions of sub-sec. (*g*) of sec. 16 cannot be invoked to support the latter by an owner who is a stranger to the original locator thereof, and does not claim title under him, or at all.

If a sub-recording office is opened by the Minister of Mines without the authority of the executive, that is an "act of omission or commission of a Government official," the consequences of which the free miner may be relieved against under sec. 53.

Posts may be ordered to be brought into Court in case of dispute regarding notices thereon or size thereof.

Form of questions for jury, and charge thereon.

Statement.

ADVERSE action tried by MARTIN, J., with a jury of eight, at Nelson, on June 25, 27, 28 and 29, 1904, wherein the plaintiff's mineral claim, the Ruby Fraction, was declared to be an invalid location in so far as it overlapped or encroached upon the Lucky Jack, the defendants' mineral claim. The latter was the senior location, having been located on July 9, 1903, and duly recorded; the Ruby Fraction, the junior location, was not located till July 9, 1903, and duly recorded; it embraced a considerable and valuable part of the Lucky Jack ground. The Lucky Three mineral claim was practically a southerly extension of the Lucky Jack, and these two claims occupied a considerable portion of the ground which was included in a prior location called the Edith, which was located on the 26th June, 1903, but never recorded. The location of the Lucky Jack and Lucky Three had been made before the time for the recording of the Edith had expired, and the No. 2 and Discovery posts of the Lucky Jack and all the posts of the Lucky Three were on Edith ground. It was contended by the plaintiff that if the Edith were a valid location at the time the Lucky Jack was located, then the latter was an invalid location and the Ruby Fraction was a valid one. The remaining material facts and the points in issue will be found in the questions to the jury and his Lordship's charge thereon.

During the course of the trial an application was made that the posts of the Edith claim should be brought into Court so that the notices thereon and the size thereof could be viewed. The application was granted and a constable directed to go to the claim and in the presence of representatives of all parties take up or cut down the

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posts, as the case might be, and bring them into Court; which was done.

Bodwell, K.C., and *P. E. Wilson* for plaintiff.

W. A. Macdonald, K.C., and *Hodge* for defendants.

Argument.

The following questions were put to the jury, who returned the answers respectively noted thereto, after having been instructed by his Lordship in the charge hereinafter given:—

1. Q.—Was rock in place discovered at the discovery post of the Edith Mineral Claim. A.—Yes.

2. Q.—If rock in place was not discovered at the discovery post of the Edith Mineral Claim was rock in place found at any, and if so at what, point in that vicinity? A.—Answered by No. 1.

3. Q.—Were the alleged Nos. 1 and 2 posts of the Edith Claim placed as near as possible on the line of the ledge or vein? A.—Yes.

4. Q.—What was the date on the alleged No. 2 post of the Edith? A.—26th June, 1903.

5. Q.—What name of claim was written on that post; that is, was it "Edith;" or either "Ester" or "Easter"? A.—Edith.

6. Was Edith No. 1 post squared or faced on four sides for at least one foot from the top; and did each side so squared or faced measure at least four inches on its face as far as so squared or faced? A.—Yes.

7. Q.—Answer the same question as to No. 2 post Edith? A.—On face on which writing is—No.* On the other three faces—Yes.

8. Q.—Answer same question as to discovery post Edith? A.—Yes.

9. Q.—Was the location line of the Edith marked so that it could be distinctly seen? A.—No.

10. Q.—Was the location line of the Ruby Fraction marked so that it could be distinctly seen? A.—No.

11. Q.—If in the location of the Edith claim you find there was a failure to comply with any or all of the above statutory provisions, then was there,—

(*a*) A bona fide attempt to comply with the statutory provisions; and if so,

(*b*) Was the non-observance of those statutory provisions of a character calculated to mislead other persons desiring to locate claims in that vicinity?

A.—(*a*) Yes. (*b*) No.

12. Q.—Answer the same question in regard to the Ruby Fraction? A.—(*a*) Yes. (*b*) No.

CHARGE TO THE JURY.

Charge to jury

Mr. Foreman and Gentlemen:—This is a mining case of interest and importance. And sitting here as you do you represent largely

* On this face the condition of this post when before the jury was that the edges were in several places broken and irregular; at the top of the facing it was two and seven-eighths inches across, and one foot lower down it was three and six-eighths inches across the face; a gradual widening from the top down.

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a new order of things, because as has been mentioned by counsel you are the first jury* that has ever sat in this Court for the determination of a mining case properly so called. For that reason I have felt it incumbent upon me to prepare with care certain questions which will elucidate this matter, and shall give you such instruction thereon as may be best suited for your guidance.

When the case was first opened it seemed to be assuming a very confused complexion, and it was for that reason that I felt it proper for your protection to promptly exclude anything that I deemed to be irrelevant, because it is the experience of Judges that the moment matters irrelevant to the issue begin to be introduced it becomes very difficult to arrive at a proper determination of the case for the true point is obscured. And if I may be allowed to say so, the wisdom of that course has become apparent during this trial, because the good progress made yesterday and to-day shews that the points have been narrowed down within a reasonable compass, and I do not think that now you will have much difficulty in arriving at a just conclusion.

I think the best way will be for me to take up each question as I proceed and use that for the groundwork of my remarks. Now the first question asked is: "Was rock in place discovered at the discovery post of the Edith claim?" At one time, gentlemen, this question of rock in place was a very difficult one indeed, owing to the fact that the Legislature had not precisely defined the term, but in 1897 it was so defined, and it is the same as "mineral in place," and the statute says: "Rock in place shall be deemed to mean and include mineral, not necessarily in a vein or lode, that is, when discovered in the same place or position in which it was originally formed or deposited, as distinguished from loose, fragmentary, or broken rock or float," etc. "Valuable deposits of mineral shall be deemed to mean and include mineral in place in appreciable quantities, having a present or prospective value sufficient to justify exploration." You will note at once that by this language there is left very considerable latitude. It is an appreciable quantity of deposit in place which has a present or prospective value sufficient to justify exploration. It would, of course, be a monstrous thing to tie a man down to such a point that he must shew that from the start he actually discovered mineral in paying quantities; that would have excluded ninety-nine per cent. of the mines in existence to-day. Nothing is further from

* For this reason it is thought desirable to give the charge in full. In the Mineral Amendment Act, 1886, sec. 1 provided that "in any mining cause or suit either party may require that the issue of fact shall be tried by a jury of five persons," but no jury ever sat under it. See as to jury in mining cases, *Iron Mask Mining Co.* v. *Centre Star Mining Co.* (1899), 1 M. M. C. 300, and note thereto.

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the intention of the Legislature than that, and the definition is the one therein given and is one which can be liberally applied in practice.

Now all the remarks I am about to make must be taken in regard to the time the location was said to be made; they have nothing to do with to-day, that would be manifestly unfair. Suppose one of you were to locate a mineral claim to-day, and a fire were to sweep through that district to-morrow, would anyone contend for a moment that even though all your posts had been destroyed your location would not still be a valid one? I think not, for it would be perfectly valid, gentlemen. Locators are only called upon to make a valid location at the time; they are not called upon to guard against subsequent forces of nature or acts of man. Apply then that general idea to the first question. This free miner went there and made his location, as he tells you, but as a matter of fact did he find mineral in place? His belief has nothing to do with the matter. If he was mistaken in it at the time, but could prove that there nevertheless was mineral there in appreciable quantities, his act was justified, and he found rock in place and is entitled to hold his discovery. And that is very important from this point of view, that the assistance of scientific evidence can be and should be called in case of a dispute of this kind to satisfy you in regard to any difficulties which may exist in the minds of men generally, as to whether or not the miner was justified in his expectation, whether this discovery was sufficient to justify exploration. You have heard what has been said by the surveyor, MacKay, who stated he has had experience in this district, such as a surveyor would be expected to have working in a mining country running lines of mineral claims, etc., and to that extent only. You have heard from the other side that from their point of view there is nothing to justify the location. In that case you will pay particular attention to the evidence of the man who has applied tests to the property. What do you find? That the only scientific witness, who is a perfectly disinterested man, and whose assays lie on that table, has told you that he found mineral there which would justify further work, and in appreciable quantities. That is what he says most distinctly. Now do you find anything in the evidence to warrant your taking a contrary view? That, gentlemen, is for you to say; if you do, you will say so.

That disposes of the first question; you will answer that, and I think it will not take you long.

The second question is: "If rock in place was not discovered at the discovery post of the Edith mineral claim, was rock in place found at any, and if so at what point in that vicinity?" Now, that question arises from the provision that it is not necessary that

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said post should be placed along the line of the vein. It may be, and very frequently is, at one side or the other. When a man discovers his rock in place, it may even not be in the vein at all; but he makes his discovery at some point and then proceeds to mark his location. His location line is determined by his No. 1 and No. 2 posts, not by his discovery post. The reason this man gives for placing his discovery post where he did—the point is not very material but it is the reason he offered—was because he found a tree in that place. And the selection of a tree for the post of a mineral claim is something that is recognized by the statute, and is a wise precaution, because there is no danger of anyone shifting it. A tree in place is the best post you could have, and the prospector would be very foolish who found a tree available for the purpose and did not take advantage of it. Any one can remove a post, but the evidences of an attempt to dislodge a tree are generally manifest. If rock in place was not discovered at the discovery post, how far from the post was it discovered? The statute says you shall place a legal post at the point where rock in place was found. Of course sometimes it is impossible to place it right on the exact spot; it might be an actual apex where such could not be done. This man says he did place this tree a few feet away from the actual point of his discovery. Yet it is strange that the professional witness when he went to see that property found that, though he had not placed the post right on the precise spot of his discovery, still he had actually placed it at a point where there was, if you believe him, sufficient mineral to satisfy the Act. If you find then that rock in place was not discovered at the discovery post where the professional witness says, as a matter of fact, it was (it is immaterial whether the man knew at the time that it was or not) then you will say what distance you understand from the evidence it was from the post, what number of feet. The professional witness again stated that it was within two feet of the ledge, and you will state in answer to this question how many feet you think the post was from the exact point of the discovery, if you believe that it was not on mineral in place.

Coming to the third question: "Were the alleged No. 1 and No. 2 posts of the Edith claim placed as near as possible on the line of the ledge or vein?" Counsel have not addressed you on that point, for the reason, I think, that it is obvious they were, if you accept the evidence that there was rock in place, if you believe the evidence of this professional witness, who says that he walked down fifty feet and saw the ledge plainly, for if you believe him on other points you will be justified in believing that. The surveyor says the same. I will say no more to you on that point; there is so much of more importance that I will not burden you with any further remark in regard to that question. But owing to the fact that it had not been spoken to it

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became necessary for me to state the question to have a finding on it. The fourth question is: "What was the date on the alleged No. 2 post of the Edith?" and take with that the next question: "What name of claim was written on that post; *i.e.*, was it Edith, or either Ester or Easter." Unfortunately a sharp conflict arose on that point, and a large number of witnesses have deposed to opposing contentions. It is something which is a pure question of fact, and you will have to grapple boldly with it and determine what it was. You must, of course, determine it as at the time, at that very day it was written, because anyone with evil intent could change the writing on a post, and if miners were to suffer from the malice or mistake of others in that way the consequences would be disastrous in the extreme. If that were so any malicious person could go out into the hills with a pencil and create disorder and confusion, and perhaps ruin any one of you gentlemen sitting in the box. You must satisfy yourselves whether that man wrote on that post the date he told you he wrote, 26th June, or whether he wrote the 25th, and you must be satisfied that he wrote the name Edith, and not Ester or Easter. In determining the question as to whether or not there has been or might have been any change, you will bear in mind whether it could have occurred in the course of nature outside of those parties altogether. You will keep in mind what the exact change is supposed to be, and how likely it is that it could have been done by man or by nature. Regarding the change in the date being from 5 to 6, you will apply your ordinary business intelligence to the question of whether the one figure could have been changed into the appearance of the other by time and nature's forces without the interposition of man. You will remark that if you take a part of the lower curve out of a 6 you get something which is similar to a 5, and by the simple wearing or scaling off of a small piece of wood it might be made to appear like a 5 a few days after.

Apply the same reasoning to the word "Easter." Could anything have occurred there other than the suggested hammering of the face of the post by some interested person with the back of an axe. It is peculiar that the number of letters are the same in Ester and Edith, or H might be taken for two letters, the consequence of a man writing in a running hand over an irregular surface. And then, of course, you will apply the other test mentioned by counsel, as to the improbability of a man putting a different name on the two posts, and No. 1 is admittedly "Edith." All these things are for you to consider. So far all this is looking at it from the plaintiff's point of view. Now look at it from the defendants'. They say there were a number of men about on that hill who saw that date and name, and certainly a relatively large number of men have sworn to it. Morgan and O'Connor, who are interested in it; O'Connor, of course, has

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conveyed his interest to Morgan, but was then primarily interested in and connected with the claim. Now I cannot help thinking it is very unfortunate that a conflict should have arisen between those two persons, Morgan and O'Connor, on some very material points. I think the matter could have been decided quicker had that circumstance not arisen; nevertheless there is that discrepancy. The witnesses Morgan and O'Connor, though on the same side, are hopelessly in opposition on a very material point in this case, as to what occurred at the time of that location. You heard what Mr. Bodwell read to you; I do not propose to enlarge on it. It is also unfortunate that Morgan comes in contact with another of his chief witnesses, Holton, on an important point. You heard that mentioned to you by counsel also. Morgan stated to you that Holton had no interest in the matter, and yet that same man told you he had a very considerable interest, that he expected to get shares, and that as a matter of fact if the deal did not go through he would not get his commission; yet Morgan told you that man had no interest. It is unfortunate that the defendant at the beginning of his case should be contradicted by two of his chief witnesses; it is an unpleasant thing, but such it is, I leave that now and say nothing more about it; it is for you to draw your own inference. I pass on to this other feature. It does seem a strange thing that this party of seven or eight men should have gone up that hill led by the man Orange Hamilton, gone direct to this claim, and having come to No. 1 post they, without any apparent difficulty and without any other assistance, proceed straight along the location line to No. 2; if not at once there is nothing to show how long. After seeing it then they were shewn this No. 2 post, apparently by Hamilton, because he directed a memorandum to be taken of what was on it, and they formed their opinion of it, and even then did not agree quite what it was; some left out a letter and some put it in. That is of the greatest importance. If these people, all in the same interest, standing there talking about and looking at it at that time, could not make up their minds whether it was Easter or Ester, some putting in the letter and others leaving it out, it is very remarkable. And it is undoubtedly a peculiar thing that Hamilton is not brought here with that memorandum, and that such an important memorandum is not forthcoming. It was taken at the time for some reason. There is no doubt something peculiar about the matter, or at least I prefer to say that the circumstance is such that there is something to justify you in thinking there is something peculiar. However, it is for you to try and solve that difficulty; that is the duty attached to your office. In certain ways some of these witnesses are independent, and yet they are possibly not so in the same way, degree or manner, and this remark applies, of course, to the surveyor Mackay, to whom objection is taken by the defend-

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ant's counsel that he is more or less retained by plaintiff. That is to a certain extent so, but it is for you to say whether a Provincial Land Surveyor, who is more or less of a public servant, because he has public and statutory duties to perform as well as private in making surveys of mineral claims, though in this case the relation is more of a private one—it is, I say, for you to say from what you have seen and heard whether it is fair to call him a disinterested witness. He states that when he was there in November he had no difficulty at all in going himself to the claim; when he was there first he went from No. 1 post to No. 2 without any assistance; and when he went again in November to take the memorandum he then saw the name on the post. "It had the name of claim on it. I made it out by myself. I was careful because it was after this dispute had come up. I had heard rumours and was told that this would come into it afterwards." I think, gentlemen, it would be unprofitable for me to dilate further on that point. I will leave it to you there, and you will give it the best consideration you can.

I will pass then to question No. 6: "Was Edith No. 1 post squared or faced on four sides for at least one foot from the top; and did each side so squared or faced measure four inches on its face as far as so squared or faced? I will again call your attention to the fact that once a good location always a good location; you must bring your minds back to the time of location. In the measurements which you will make on the post which is before you, you are to bear in mind the natural results of the weather and shrinking on a post. I think both the posts were trees that had been burnt shortly before, and the discovery post was a dead cedar. You will bear in mind the probability or otherwise of any one of these posts having contracted a little. I have designedly refrained from applying a foot rule to them myself, for it is better that I should not as you are the judges of fact, and therefore I am unable to tell you how it would scale, and it is not my province and I express no opinion. One of the witnesses told you that discovery post is harder now than it was when faced. I mention that as an illustration, and you will consider whether or no a dry, "punky," post would become harder in time and contract in drying. You will then apply the instruments that counsel have provided, and see what result you arrive at in regard to the post, and I draw your attention to the fact that it is not being "squared" simply that the statute directs, it is "squared or faced" so it would not appear to be necessary to insist upon actual square corners; either "squaring" or "facing" satisfies this statute. You are to determine whether it is squared or faced, and no doubt you understand that term better than I do, for you have probably all had more experience in such matters than I have. Whether or no that post is "faced" as one would expect under the circumstances is for you to say. That

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statutory provision is to be considered in regard to the object sought to be accomplished, and the means that would probably be in the hands of the parties. No one expects a prospector to go out with a carpenter's kit on his back; you do not expect mathematical squaring or facing, for if so probably no post would be correct, for a hair's breadth would determine the point. Out in the woods on such intent what a prospector would have would be an axe certainly, and probably his knife, and it will be a knife and axe job, gentlemen, so you will see whether they are squared or faced according to a knife and axe job. That is, you will not look for mathematical precision, because with such tools it is practically impossible to get an exact rectangle 1 foot in depth on a post, but you must see that what the statute requires has been essentially performed. It is a question of degree. You will at once see that if the post were only squared or faced three inches on all sides it manifestly would not do. Then you would advance and see if it were three and a-quarter, three and a-half, three and three-quarters, and bear in mind what I said about effects of time and wear and decay; but it is not proper that I should point out for you where you would be justified in the circumstances in finding that the essential element of the statute had been satisfied. That is for you to decide, but as I say it must be not a mathematical but an essential compliance that you will require. I have been thinking about an expression to use to signify what I mean and I can think of nothing better than that in directing you on this important point.

The seventh question is the same, only that it relates to No. 2 post; and the eighth is the same question regarding the discovery post. Apply the foregoing directions.

The ninth question is:—"Was the location line of the Edith marked so that it could be distinctly seen?" In regard to that I propose to say very little. The plaintiff's witnesses, the locator Grothe and the surveyor say it was; some of the witnesses for the defendant even say it was, while others discovered and walked along it without any difficulty. Ward admitted that at the starting point there were some bright new blazes that started him on the way to No. 2. If he started at that place and found No. 2 without difficulty you will probably have no more difficulty than he had; that is for you to say.

Question 10 is the same, but in regard to the Ruby Fraction, it is apparently admitted that it was marked for 50 feet, to the brow of the hill; then the dispute arises from that point on. It is suggested in behalf of the plaintiff that what happened was that after they got along that line a certain distance they got so close to the Lucky Jack's blazing that they proceeded along the Lucky Jack line and arrived at practically the same point. Now if the Lucky Jack loca-

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tion line were marked there is no reason why other parties should not avail themselves of it. It would be absolutely unnecessary to go over the same location line again; if there was a good one there they could adopt it and use it themselves. Then there are a number of witnesses who swear that they did not use the Lucky Jack line, and that from the foot of the hill for the rest of the location line beyond that fifty feet there was practically no blazing at all, and that the Lucky Jack line was not incorporated with that of the Ruby Fraction. That is a question of fact, upon which it is unnecessary for me to say anything more; you have heard counsel elaborately, and it would only be repetition on my part.

That brings me to the final question, the 11th, relating to both claims, the Edith and the Ruby fraction. If in the location of the Edith claim (taking that first) you find that there was a failure to comply with one or all the above statutory provisions, if you find that any of those questions should be answered against the Edith location, then you will inquire whether or no (*a*) a *bona fide* attempt to comply with those statutory provisions was made, and if it was, was (*b*) the non-observance of those statutory provisions, *i.e.*, the defect or defects you so find, of a character calculated to mislead other persons desiring to locate claims in that vicinity. It will only be necessary for you to go into these questions if you find there are any defects. These are called the remedial questions. Owing to the Court being forced, no latitude being given it, to construe the Act strictly against the locator of mineral claims, and it appearing that hardship had resulted from the Court being placed in that position against its inclination, the Legislature passed this remedial section to enable locators to have their claims validated, provided they had made a *bona fide* attempt to carry out the Act, and did not mislead others who wished to locate in the same vicinity by any departure from the strict letter of the law. Let us take up the question first in reference to the Ruby fraction. I take that claim first, and not the Edith, because the only point upon which the Ruby fraction is attacked is that there was no location line, so the only point you will have to answer in regard to the Ruby fraction is the tenth question. If you think the location line of the Ruby fraction was not properly marked, you will say whether or no the locators thereof attempted to do what they thought was necessary to carry out the provisions of the Act, and whether or no their failure was such as to mislead other people desiring to locate claims in the neighbourhood. There is very little for me to say about that. You take into consideration the surrounding conditions and come to a decision accordingly. And in regard to what is or is not of a character calculated to mislead other persons, I may point out that these words are used: "calculated to mislead other persons desiring to locate claims in the vicinity." You

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must bear in mind what it means by the word "persons." It does not mean an inexperienced person foolishly wandering about in the tall timber and likely to lose himself, such as is known in this Province as a "chee-chahko,"* or "Johnny-come-lately"; a man of that kind has no business in the hills. It means this; would a sensible man, not necessarily a skilled prospector, but nevertheless an ordinary sensible and observant man who is entitled to be at large in the woods and hills, would he be misled by what has been done? And it means further, a man of that kind who desires to do a certain thing, to locate a claim, and to do so he must be presumed to be reasonably familiar with the conditions of this country which will have to be encountered in prospecting. It does not mean a man who desires to "locate" technicalities, or difficulties; most people can "locate" difficulties anywhere they want to, even without going into the hills. It means a man who goes out, and being intent upon the business in hand, desires to locate a claim and to do what is fair by all concerned, and who acts in a reasonable and sensible manner, and the test is, would he be misled by what has been done? I leave it to you to apply these considerations to the Ruby fraction.

When you come to apply them to the Edith there is something additional to be said. Undoubtedly if you believe the story of Gray, and no one contradicts him on that point, he endeavoured to locate a claim there; whether it was a *bona fide* attempt you will judge for yourselves. He put a No. 2 post there; if you find it was defective, with a wrong date or wrong name on it, or a wrong date only or wrong name only—it is a question of degree—a wrong date alone would not be so likely to mislead as a wrong date and wrong name together, so distinguish between the two in your own minds. Suppose at the worst he did put this post there, called it the Easter or Ester by mistake, and wrote the date the 25th, would that, having regard to all the circumstances, be likely to mislead? If, for instance, you are satisfied that there was a location line from No. 1 post to No. 2, would any reasonably alert person of the kind I have described, coming from No. 1 and walking down that location line, and finding that No. 2 post with a name very similar, at the worst, to "Edith," and a date only one day different at the worst, and coupling that with the fact that there was no other post of any other claim there that answered to that name, or one at all like it, would he, I say, be misled? That is for you to say. In that locality, taking all the surrounding circumstances, is it a case where you think you could conscientiously apply the remedial clause of the statute and excuse the locator for his slip or error, if such it was?

In that relation a very important thing did occur. Ward and Jennings did as a matter of fact locate a claim there on the 14th

* See Glossary in Vol. 1, p. 860.

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July. Now this is a circumstance to be taken into serious consideration, viz., that there were two persons there, now witnesses for the defendant, who were not misled by what occurred, because they actually located a claim themselves, and they took good care to keep off this Edith ground. Even if they did not believe it to be a valid location they took good care to keep out of trouble by working to the end of it and then went back, simply causing their claim to overlap it about 20 feet, which they did solely because, as Ward said, he did not want any fraction to intervene. Now, is that good evidence as to whether, in the opinion of these free miners, what had been done was likely to mislead them? That is something done by these very persons who claim that they could not make out whose ground it was, yet when it came to protecting themselves and keeping out of danger they located the claim in the safe manner mentioned. That is a very important thing to bear in mind.

Having instructed you as fully as I think desirable on the said new and technical mining questions, it is only necessary in this case for me—generally, to tell you three things. First—In the weighing of this evidence it would not necessarily follow that, because a man has made in the course of his evidence what you think is an error, or even in allowing his partisan feelings to influence him had strained the truth, you should reject his whole evidence; on the contrary you may accept the credible part of the testimony and reject the rest, unless, of course, you are satisfied there was deliberate falsehood, when you would be justified in a total rejection if you feel so disposed.

Second, that it does not follow that because several witnesses depose to one story against that of one man opposed to them, you necessarily should accept the statement of the many; for there may be something in the story of the many that makes you think it is a concocted tale and comes from one root; and though five or six men may tell an harmonious story, yet if the whole testimony is rooted in falsehood the fruit it bears will be only one thing, it will be falsehood as well. If you think such a growth exists, cut it down, because the concocted narrative of fifty people is in the eye of the law but one false piece of evidence, and cannot stand against the testimony of one credible witness. If it can be shewn to emanate from a false source, the root being false the flower and the fruit will be false also. So if you are once satisfied of such a state of affairs, a cloud of witnesses avails nothing. But on the other hand, before you arrive at such conclusion, you will be thoroughly satisfied of the identical source of the tainted testimony for there must be something of a weighty character which would justify you in forming that opinion.

Third, if after considering the matter carefully you are unable to arrive at a precise determination upon those points, you will be justified (as I should do if I were dealing with the matter) if it is im-

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possible to turn the scale of your opinion either one way or the other, in an attack upon that Edith location, which is the senior one, you will be perfectly justified in giving to that location in such circumstances something that would be very like what is called the "benefit of the doubt" in criminal cases. That is, if it come to the point where it is absolutely impossible for you to say whether the senior location is valid or invalid, you will be justified in presuming in favour of its validity. But not until then, gentlemen, I wish you to distinctly understand that you must first come to the point where it is impossible to say yea or nay; then the presumption in favour of the validity of the senior location would justify you, if you felt so disposed, and there was no other way to arrive at a verdict, in declaring in favour of it.

Finally, it is, of course, almost unnecessary for me to tell you that you are part of this Court, the judges of fact, and I hope, if I may be allowed to say so as a Canadian, that nothing in British institutions in the determination of the rights of subjects stands for higher things than a Canadian Court of Justice, and this is a temple of justice, a poor one outwardly and structurally perhaps, but nevertheless inwardly it stands for noble ideals; and I think it is unnecessary for me to say more than that in case anything said by counsel should have unconsciously enlisted your sympathy for his client, you will, of course, reject any such feeling from your minds, because it is inconsistent with your office, to put it on the highest and proper plane. And in addition it would be dangerous for you, on the lower and personal ground of the possibility of one of you some day in similar circumstances being a litigant, to deal with the matter other than on the basis of strict legal right, irrespective of consequences. It all depends on how different people view these things. On one hand the learned counsel for the defendant thinks it is hard that his client having expended a large amount of money on his claim should find himself confronted with a law-suit by the result of which he may lose it. But on the other hand the learned counsel for the plaintiff thinks it is a lamentable thing that the man who originally located the Edith, and who was the first on the ground, should lose it and the Lucky Jack people should obtain it. As a matter of fact he, according to his own story, abandoned the Edith after due location because he believed he had infringed on another man's ground and so allowed it to lapse rather than "jump" another man's claim, and therefore because he acted strictly according to the statute and as an honourable man would act, finds other parties in possession of the ground, so he and his partner come back and try to recover what they have lost. Mr. *Bodwell* thinks this is very hard lines indeed; Mr. *Macdonald* naturally has his contrary idea. I mention these facts to show from what different points of view things may fairly be looked

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at. Undoubtedly it is the policy of our mining laws to give every possible consideration to the prior locator. The whole policy of the Mining Act is in his favour. Now the question is, who is the prior locator here. I mention that to shew the necessity of adhering strictly to what is the actual justice of the case irrespective of what one side may, perhaps, think entitles him to some favourable consideration, not necessarily anything illegal at all, but favourable consideration. Gentlemen, to admit sympathy into the witness box is a dangerous matter. Favourable consideration to one person to-day might have some unforeseen results to-morrow, results which nobody can foretell.

You will retire to consider your verdict, and take with you these questions and the statutory definition of "rock in place."

Argument.

Macdonald, K.C.: I ask your Lordship to instruct the jury as to Pattinson's evidence that when he staked on the 17th July in company with Morgan that the Edith had lapsed.

His Lordship: That is not an instruction on evidence, it is a deduction of counsel therefrom.

Macdonald: It is a fact.

His Lordship: It is a matter in controversy. Mr. *Bodwell* contended on the other hand that he did not so stake.

Macdonald: He staked the Addie claim on 17th July. It covers the same ground as the Edith. I ask your Lordship to draw the attention of the jury to the fact that Morgan and his assistants could have done the same thing.

His Lordship: I should not like to do that; that is asking me to select a particular piece of evidence and comment on it in your favour. I could not do that without drawing attention also to the remarks of Mr. *Bodwell* on the other side; I do not consider that as an instruction of law; it is asking me to give what I consider undue prominence to a particular piece of evidence.

Macdonald: I ask your Lordship to instruct further in the matter of onus. That when parties submit an unrecorded claim like the Edith, it is for them to assume the onus. It differs from a recorded claim with a *prima facie* title. That is, if the matter gets to that question, assuming it is a location at all.

Bodwell, K.C.: Under the Mineral Act the title depends on location, and during the period in which these questions arise there was a location, a valid location according to the evidence, and the record would not become necessary until 13th July. We would be the senior location up to that date, and if there is any doubt we ought to be given the benefit of that doubt.

Macdonald: That is assuming that point proved.

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His Lordship: There must be some assumption if matters are actually evenly balanced.

Macdonald: The party setting up this location has to prove a good location, good for fifteen days. The very fact that he takes upon himself that onus is an indication that the burden is upon his shoulders; the doubt should go in favour of the defendants.

Bodwell: If your Lordship will tell the jury that if our evidence is believed we have satisfied every onus of proof that is upon us?

Macdonald: That is just the point I am endeavouring to make. If they believe the plaintiff's evidence there cannot be any balance at all.

Bodwell: In attempting to decide whether our evidence is to be believed or not they cannot bring into the question any suggestion of onus of proof that is upon us; the question is one of credibility entirely, and if we are right we have satisfied the onus.

Macdonald: We are supposing that the jury reach a stage where they are unable to determine any of these questions and simply say "We don't know, we cannot say, our opinions are divided;" then I submit that in that case the burden of upholding the location of the Edith rests upon the plaintiff, and that if they have failed to prove it it should be so found.

Argument.

Bodwell: I think that is right, if the jury are truly unable to decide, but they must not get out of their duty by resting on anything like that. If they are truly unable to decide, then the plaintiff must prove his case, but they should not shirk their duty, they must come to a decision if they can.

His Lordship (to jury): Gentlemen, arising out of the somewhat unusual fact that there is not and never was a record to the Edith claim, you have heard the discussion that has taken place in regard to the question of onus. I think it is a very nice point indeed, in view of the unusual circumstances, and I think it had better be left in this way. You should deal with the matter irrespective of any presumption in favour of the validity of the location either way. Simply rest your finding upon the weight of evidence, and endeavour to so dispose of the issues, because a great deal might be said in a case of this kind as to what is the exact presumption or exact onus. Treat it thus, and I understand this is what counsel mean; if you find that you can accept the story of the plaintiff, and consider it a credible story all through, you will not be troubled about the question of whether or no the onus is on him to prove his location. If on the other hand, after a fair weighing of the case, you find you cannot give effect to the plaintiff's story, then you will reject it and find in favour of the defence.

The jury thereupon retired, and in due course returned the answers already set out, whereupon

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Macdonald, K.C., on the said questions and answers, moved for judgment:—Answers 7 and 9 show the Edith is an invalid location unless the curative sub-section (*g*) can be invoked, and it cannot in this case, for it has been decided that only one claiming title through the original locator can do so, and not a third party: *Creelman* v. *Clarke* (1898), 1 M. M. C., 228: *Boie* v. *Salter, Ib.* 240.

Further, the Ruby Fraction is an invalid location and its record is one in name only, because the declaration of the locator, Grothe, was taken before a person not qualified to take it and consequently there is and never was any foundation for its record. Alex. Lucas, who took the oath and signed in the sole capacity of deputy mining recorder of the Trout Lake Mining Division ("viz., Alex. Lucas, D.M.R.") was not at that time an official qualified to take it. The departmental letter* from the Minister of Mines, dated August 10, 1903, instructing him to "establish a sub-mining Recorder's Office" at Poplar Creek, was *ultra vires* if it is intended to be relied upon as authority to open a new mining sub-division or appoint a deputy mining recorder, because mining recorders can only be appointed by the Lieutenant-Governor in Council, sec. 82 of the Mineral Act.

Argument.

Assuming he was the mining recorder of the Ainsworth Mining Division, that gave him no jurisdiction in the Trout Lake Mining Division, and he did not purport to act as a mining recorder generally under sec. 141 of the Mineral Act, but as a deputy of a particular division: though he was subsequently appointed by order in council† that appointment could not validate his previous wrongful act.

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*DEPARTMENT OF MINES,
Victoria, 10th August, 1903.

A. Lucas, Esq., Mining Recorder, Kaslo, B.C.:

SIR,—I have the honour to request that you will proceed to Poplar Creek at the earliest possible date and there establish a sub-Mining Recorder's Office for the convenience of miners on both sides of the divide between the Ainsworth and Trout Lake Mining Divisions. You will, of course, forward the Records for the latter Mining Division to the office at Trout Lake, and those for Ainsworth Mining Division to your own office at Kaslo.

I would suggest that you take a tent and all necessary recording forms, licences, stationery, etc., with you from Kaslo, and remain in charge of said Sub-Mining Recorder's Office until I advise you further in the matter.

I have the honour to be, sir,
Your obedient servant,
(Sgd.) R. F. GREEN,
Minister of Mines.

†Brit. Col. Gazette, Sept. 3rd, 1903, p. 1913.

"Appointments. His Honour the Lieutenant-Governor in Council has been pleased to make the following appointments:—

28th August, 1903.

Alexander Lucas, of the City of Kaslo, Esquire, Mining Recorder, to be a Collector of Revenue, Collector of Revenue Tax and Deputy Mining Recorder for the Trout Lake Mining Division, with Sub-Recording Office at Poplar Creek."

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Bodwell, K.C.: In the first place, the discovery post of the Lucky Jack is on the Edith ground.

Macdonald, K.C.: That is so; the map shows it.

Bodwell, K.C.: Then if the Edith is a valid location that is an end of the defendant's case, for his discovery post is on our ground.

Secondly, as to the curative sub-sec. (*g*), there is no statutory restriction and it is unreasonable to say that it should be limited in its application. A statutory provision of such a nature that it affects the validity of a conflicting location should on every principle of legal construction be open to any one interested in the ground covered by the conflicting and original locations, otherwise the utility of the section is very greatly cut down.

Thirdly, as to the declaration, Lucas was a duly appointed mining recorder of another division, and as such he could, under sec. 141, take the declaration even if his original appointment by the Minister was invalid; but assuming he was not properly qualified he held himself out so to be and therefore his act of "omission or commission" should be relieved against under sec. 53, because he was already a "Government Official" within the meaning of that section. Even if his act could not be validated under that section, it can be invoked against the act of the Minister himself, who was the chief Government official of that Department, and it was owing to his mistake, if any, that the declaration was wrongly taken, because by the opening of this office he extended an official invitation to free miners to record their claims there which it would have been dangerous for them to ignore even if if they had known that the act of the Minister was open to objection. The situation is unquestionably one which the section was passed to relieve against.

Argument.

Per CURIAM:—As to the latter objection, sec. 53 clearly applies to cure any error, if there is one.

As to the former, I am bound by the decisions cited, particularly *Boie* v. *Salter,* which is a direct authority on the point, though I feel I ought to say that Mr. Bodwell's argument is a very plausible one at least, and the opinion of the Court of Appeal should be taken on such an important question. Sitting here, however, I must give a formal ruling pursuant to those cases which I am bound by, and therefore declare the Edith to be an invalid location and consequently the Ruby Fraction likewise; and alternatively, and in particular, that the latter is also an invalid location in so far as it overlaps the Lucky Jack, which is declared to be a valid location. There will be judgment accordingly with costs.

Bodwell, K.C.: I apply for a stay of proceedings pending appeal, and for an injunction or restraining order to prevent the defendant

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from further proceeding, pending the appeal, with his application for certificate of improvements, and I undertake to give notice of appeal at once and expedite the hearing thereof.

Macdonald, K.C.: I object to any order being made, the circumstances do not warrant it; and in any event there should be no stay as regards the recovery of the costs of this action so far as it has gone.

Bodwell, K.C.: There need not be any difficulty on that point; I undertake to give security therefore after taxation.

Per CURIAM: In the special circumstances of this case, and in view of the undertaking given, the defendant should be enjoined as requested: a similar course was adopted in *Dunlop* v. *Haney* (1899), 1 M. M. C., 344.

Judgment accordingly.

NOTE.—The plaintiff appealed and the appeal was argued at Vancouver on the 21st November, 1904, before Hunter, C. J., Irving, Duff and Morrison, JJ., and stands for judgment. This case is, like the next one, out of its chronological order, and for the same reason, see note thereto.

As to fatal defects in location, see list of cases cited in vol. 1, p. 504, and those in note to preceding case.

As to relief from mistakes of Government official, see *Tanghe* v. *Morgan*, *ante*, p. 178, and cases cited.

As to effect of a plan being put in evidence, see *Last Chance Mining Co*, *Ltd.* v. *American Boy Mining Co.. Ltd.*, *ante*, p. 150 (note).

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CENTRE STAR MINING CO., LTD. v. ROSSLAND-KOOTENAY MINING CO., LTD.

Trespass—Wrongful Abstraction of Ore by Trespass, Workings and Conversion—Measure of Damages for Abstracted Ore—Injury to Adjoining Mine by Accumulation of Water in Trespass Workings—Continuing Trespass—Liability of Company for Trespass of Predecessor in Title—Companies Act and Licence to Extra-Provincial Company.

A company is not liable for the tort of its predecessor in title unless it adopts it.

Where a company after taking over a mining property discovers that certain ore lying on a dump and believed to be waste and of no market value was wrongfully taken by its predecessor, yet takes no steps to return it, but does not deal with it in any way, that is not an adoption of the conversion thereof by the original trespasser.

The value of ore so situated as regards the successor in title is its market value as it lies and not its value before abstraction.

Held, on the facts, that the increased flow of water into plaintiff's mine, as complained of, was not due to the accumulation thereof in the trespass workings.

Statement. Action tried by MARTIN, J., at Rossland, on the 8th, 9th, 14th and 15th December, 1903, to recover damages from the defendant company for trespassing upon and abstracting ore from the Centre Star mineral claims by means of trespass workings extending from the defendant's adjoining claims, the Nickel Plate and Ore-or-no-Go, and also for injury caused by the alleged accumulation of large quantities of water in the trespass workings. The trespass was admitted, but it appeared on the trial that it had been perpetrated by the defendant company's predecessor in title, the Rossland Great Western Mines, Ltd. Evidence was adduced by both parties as to the value and amount of ore taken and as to the nature and extent of the trespass workings and the accumulation of water therein and the flow and drainage thereof into the plaintiff's mine. The findings of the learned Judge and his statement of the material facts will be found in his judgment.

Argument. *A. C. Galt* for the plaintiff: As to the ore abstracted; the effect of the agreement* between the Rossland Great Western Mines, Ltd.,

*The first agreement provided that the Rossland Great Western Mines, Ltd., should sell all its assets and undertaking to a new company to be formed for that purpose under the name of the "Rossland-Kootenay Mining Company, Limited," on certain terms and conditions, which included one that the New Company should "pay and satisfy the debts and liabilities of the Old Company of whatsoever nature and shall indemnify the Old Company" therefrom. It was also agreed that the New Company should "take over and perform all the uncompleted contracts and engagements of the Old Company and indemnify" it from all liability thereon. The books and documents of the Old Company were to be handed over to the New Company, except those relating to its constitution.

The second agreement "hereby adopted" the first agreement "in all respects as if the (New) Company had been a party thereto instead of the said" Mitchell.

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Argument.

and W. B. Mitchell, dated 2nd May, 1902, and the subsequent agreement between that Company and Mitchell and the defendant company on 28th May, 1902, and the licence* to the defendant company under sec. 124 of the Companies Act, dated 2nd August, 1902, is to make the defendant liable for the trespass of its predecessor in title, for the licence is tantamount to a statutory obligation to assume all liability of the old company: *Ecclesiastical Commissioners for Eng-*

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* LICENCE TO AN EXTRA-PROVINCIAL COMPANY.

"Companies Act, 1897."

Canada:
Province of British Columbia:
No. 234.

This is to certify that the "Rossland-Kootenay Mining Company, Limited," is authorized and licenced to carry on business within the Province of British Columbia, and to carry out or effect any of the objects of the company to which the legislative authority of the Legislature of British Columbia extends.

The head office of the company is situate in England.

The amount of the capital of the company is £150,000, divided into 150,000 shares of £1 each.

The head office of the company in this Province is situate at Rossland, and Bernard MacDonald, Mine Manager, whose address is Rossland aforesaid, is the Attorney for the company.

Given under my hand and seal of office at Victoria, Province of British Columbia, this 2nd day of August, one thousand nine hundred and two.

S. Y. WOOTTON,
Registrar of Joint Stock Companies.

The following are the objects for which the company has been established:

(*a*) To adopt, enter into and carry into effect, with or without modifications, two agreements, one dated the 2nd day of May, 1902, and made between the Rossland Great Western Mines Limited (a company registered under the Companies Acts, 1862 to 1898, hereinafter called the "Rossland Company"), of the one part, and William Blayney Mitchell, as Trustee for this Company, of the other part, for the acquisition of the assets and undertaking (subject to the liabilities) of the Rossland Company; the other dated the 2nd day of May, 1902, and made between the Kootenay Mining Company, Limited (a company registered under the Companies Acts, 1862 to 1898, hereinafter called the "Kootenay Company"), of the one part, and William Blayney Mitchell, as Trustee for this Company, of the other part, for the acquisition of the assets and undertaking (subject to the liabilities) of the Kootenay Company, and to develop work, turn to account, or deal with the property comprised in the said two agreements, and to exercise any of the hereinafter mentioned powers and objects of this company, which powers and objects may be exercised independently of the primary objects stated in this clause, and this clause shall not minimize or derogate in any way from the company's powers of acquiring other mines, either in addition to or in substitution for the property referred to in the said two agreements, etc., etc., etc. . . . .

(*f*) To acquire and undertake the whole or any part of the business, property, assets and liabilities of any person or company carrying on any business which this company is authorized to carry on, or possessed of property suitable for the purposes of this company. . . .

(*o*) To enter into partnership or into any arrangement with respect to the sharing of the profits, union of interests or amalgamation, reciprocal concession or co-operation, either in whole or in part, with any such company, corporation, society, partnership or persons. . . . .

[Brit. Col. Gazette, Aug. 7th, 1902, p. 1252.]

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land v. *North Eastern Railway Co.* (1877), 4 Ch. D., 845, 847; Palmer on Companies (1898), Vol. 1, pp. 115-18; and see secs. 128 and 129, and the definition of "Charter and Regulations" and "Extra Provincial Company," in the Interpretation Section, the defendant did not originally take the ore, yet it has kept it in its possession on its ore dump since the time it took over the property from its predecessors, and after knowledge of the conversion; this is an actual conversion for which the defendant is liable to the same extent as if it had been the original trespasser or the keeper of stolen goods, for it has in the circumstances adopted the tortious act, having made no effort to return the ore, and according to *Armoury* v. *Delamirie* (1822), 1 Strange 504; Smith's Leading Cases (11th Ed.) 356-7; it is liable for the full value thereof, *i.e.*, $82,800; and see *Hiort* v. *Bott* (1874), L. R., 9 Ex., 86, 89; Mayne on Damages (6th Ed.) 504; *Lancashire Wagon Co., Ltd.*, v. *Fitzhugh* (1861), 6 H. & N., 502; *Cooper* v. *Willomatt* (1845), 14 L. J. C. P., 219; *Hollins* v. *Fowler* (1874), L. R. 7 H. L., 757, 764; Lindley on Mines, pars. 868, 869; *Llynvie* v. *Brogden* (1870), L. R., 11 Eq., 1888.

Argument.

As to the accumulation and drainage of water: The evidence proves it, and the accumulation of water in the trespass workings and the maintenance in particular of a large column of water in the Nickel Plate shaft, though on defendants' property, caused a greatly increased pressure of water and consequent percolation into plaintiff's mine, which is at once a continuing trespass and a nuisance, and plaintiff is thereby prevented from opening up an important section of its mine; see Pollock on Torts (Blackstone Ed.) 328-51; Beaven on Negligence (2nd Ed.) 484 & 490; *Attorney-General* v. *Colney Hatch Lunatic Asylum* (1868), L. R., 4 Ch. Ap., 146, 153, 165; *Humphries* v. *Cousins* (1877), 2 C. P. D., 239; *Rylands* v. *Fletcher* (1868), L. R., 3 H. L., 330; 1 Sm. Lead Ca., 810; Lindley on Mines, pars. 807-8; *Hurdman* v. *North East Ry. Co.* (1878), 3 C. P. D., 168; *Ross* v. *Hunter* (1881), 7 S. C., 289; Kerr on Injunctions (4th Ed.) 123, 196-7; Bainbridge on Mines, 432-3, 438; *Mexborough* v. *Bower* (1843), 7 Beav., 127.

C. R. Hamilton for defendant: The evidence shows as a fact that the trespass workings were not the cause of the increased flow of water into the plaintiff's mine, which must have come from an undiscovered source. No case can be cited to support the contention that, in such circumstances as exist here the tort, or its consequences, of a predecessor in title can be fastened upon a successor. There is no continuing trespass here, nor a nuisance in the proper sense of that term. See *Smith* v. *Kenrick* (1849), 7 M. G. &. S., 515; *Baird* v. *Williamson* (1863), 15 C. B. N. S., 375; *Attorney-General* v. *Council of the Borough of Birmingham* (1858), 4 K. & J., 528; *Fletcher* v. *Smith* (1877), 2 A. C., 781; *Taylor* v. *Stendall* (1845) 14 L. J. Q. B., 301;

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Clegg v. *Dearden* (1848), 17 L. J. Q. B., 233; *Firmstone* v. *Wheeley* (1844), 2 D. & L., 203; Lindley on Mines, 1463, par. 608.

As to conversion: There was no adoption of the trespass of our predecessor and no dealings whatever with the ore which was found on the property when the defendant took it over; at any time the plaintiff could have come and taken it away, for in our estimation it was valuless, and, as a matter of fact, it is even now of no commercial value: *Hall* v. *Duke of Norfolk* (1900), 2 Ch. 493.

As to the effect of the agreements and licence: There is nothing in them which entitles the plaintiff to bring an action against the defendant for there is no privity between them either in tort or contract. The licence on its face shows that it imposes no obligation upon us, but is simply, as its name implies, an authorization to do certain acts: see *In re Empress Engineering Co.* (1880), 16 Ch. 125; *Wilson* v. *Waddell* (1876), 2 A. C. 95.

Cur. adv. vult.

13th April, 1904.

Judgment.

MARTIN, J.:—It is alleged in the statement of claim, first, that the defendant company, the owner of the Nickel Plate and Ore-or-No-Go mineral claims, trespassed upon the Centre Star mineral claim, the property of the plaintiff company, and took certain ore therefrom, or, alternatively, that if the defendant company did not do so, its predecessor in title (The Rossland Great Western Mines, Ltd.) did. The evidence shows that it was the latter company and not the defendant that took the ore, but it is sought to make the defendant liable for the trespass on the ground that the effect of the agreement made between said latter company and Mitchell, dated 2nd May, 1902, before the defendant was in existence, and the confirmatory agreement between it and Mitchell of the one part, and the defendant on the other part, dated 28th May, 1902, is to create a partnership between these two companies under the name of the defendant; and the licence issued to the defendant on the 2nd August, 1902, is relied upon in support of this view. On this point it is sufficient to say that after considering the additional authorities cited by leave, I see no reason to alter my opinion formed at the trial, which is, that the licence being permissive in its nature cannot be regarded in the same light as an Act of Parliament expressly creating a statutory obligation, and that there is no privity of contract between the plaintiff and defendant companies, nor can they be regarded as partners in the proper sense of that term. It is to be observed that clause 1 of the agreement of the 28th May says in effect that the prior agreement of the 2nd of May is to be read as though the de-

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fendant company had been a party thereto instead of Mitchell. Now even if that agreement had originally been so entered into between these two companies, it is apparent, to me at least, that the present plaintiff would have no cause of action against the defendant for torts committed by the Rossland Great Western Mines, Ltd. The case of the *Natal Land Co.* v. *Pauline Colliery Syndicate* (1904), A. C. 120, supports in general the foregoing views.

Secondly, it is alleged that in any event the defendant is liable for conversion of the ore, estimated at 2,011 tons, now lying on its property on the Nickel Plate dump, which was admittedly wrongfully taken by its said predecessor from the Centre Star claim.

For the present consideration of the point, I shall momentarily accede to the contention of plaintiff's counsel that when the defendant on the 16th August, 1902, took possession of the Nickel Plate and Ore-or-No-Go claims it became affected with notice of the fact that this ore had secretly come from the Centre Star mine, and was the property of the plaintiff, and that it did not convey that information to the plaintiff till the middle of March, 1903, which was the first knowledge the plaintiff had thereof: since that time the plaintiff has been at liberty to remove the said ore from said dump without any interference by the defendant, but it has not seen fit to do so. It cannot, properly speaking, be said that the defendant wrongfully, if at all, took possession of the property because it had been where it was long before the defendant began to exist in British Columbia, on the 2nd of August (the date it received its licence), nor, as Thompson says, did it begin to do business till the 16th of that month when it took possession of the claims and plant aforesaid. It did not in any way attempt to deal or interfere with the ore, or exercise over it any rights whatever, but simply left it lying where it was. It is, I think, fair to say in the circumstances, that the defendant may be considered to be in a state of innocence as regards this ore till the last mentioned date at least.

Despite these facts the plaintiff contends that the defendant should be held accountable therefor to the same extent as the original trespasser, but cites no authority in support of such an extreme view. I quite agree that one who trespasses upon another's mining ground and clandestinely abstracts ore therefrom should be held strictly accountable for his fraudulent acts, and everything in doubt should be presumed against him as the result of his dishonest conduct, but I fail to see that the defendant can in any way be regarded as occupying that position. The situation is similar to a case where a man buys a field from A. knowing that A. has left on it some sacks of potatoes which are the property of B., though unknown to B., and simply says and does nothing but lets them lie there till they rot

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away. In such circumstances is the purchaser liable to B. and if so, for what, and on what principle? In my opinion he is clearly not liable at all, though it would have been a neighbourly and friendly act to have notified B. And the principle does not differ because the chattels happen to be imperishable like ore, instead of perishable like potatoes. To my mind there is no element of conversion in such a state of affairs, because to constitute this injury there must be some act of the defendant repudiating the owner's right, or some exercise of dominion inconsistent with it, while here there was nothing of the kind, nor was even formal possession ever attempted to be taken. Mere passivity is all that the defendant can be accused of, but there must be more than that before conversion can be established. As was said by Mr. Baron Parke in *Simmons* v. *Lillystone* (1853), 8 Ex. 431:—

> "In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it."

And see also *Lethbridge* v. *Phillips* (1819), 2 Stark. 544; *Thorogood* v. *Robinson* (1845), 6 Q. B. 769; *Fouldes* v. *Willoughby* (1841), 8 M. & W. 540; and *Hollins* v. *Fowler* (1874), 7 H. L. 757; wherein it is also shewn that even where there is possession, if of lawful origin, there must be a demand and refusal before an action for conversion will lie, and there has been no demand here. The result of the cases is concisely summed up in Addison on Torts (7th Ed.) 504, as follows:—

> "A man cannot be made a bailee of goods against his will; and, therefore, if things are left at his house, or upon his land, without any consent or agreement on his part to take charge of them, he is not thereby made a bailee of them; and if the goods are demanded of him, and he says he will have nothing whatever to do with the goods, such a declaration, in answer to a demand of the goods, is no evidence of a conversion of them."

In arriving at the foregoing conclusion I have also assumed that the property alleged to have been converted is of any commercial or market value, for if it is not, the defendant's case is not only greatly strengthened as to the conversion itself, but there would be no damages in such circumstances as exist here.

Now the proper measure of damages, if any, is the amount of pecuniary loss the plaintiff has sustained by the conversion of the chattel, *i.e.*, what it was worth at the time of the conversion, and if he does not receive it back he is entitled to its full market value. The question then arises, what is the fair market value of the ore in dispute? According to Thompson it was simply waste material on the dump, and taken on the average would not run more than $3.00 to the ton, total value. James Cram, a witness for the plaintiff company, places it at $3.60 to $4.60, but though the onus is on the plain-

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tiff to establish the maket value no evidence at all is adduced to shew that ore of so low a grade has any market value whatever; it certainly is not shipping ore. Simply because there is a certain amount of precious metal in ore that does not mean that it has any market value, because, for example, ore which carries $5.00 worth of gold per ton, but requires an expenditure of $6.00 to extract it, is worth just $1.00 less than nothing, and is not only useless to its owners but an encumbrance about their mine.

On the evidence, which is all I am entitled to consider, I am forced to the conclusion that since the time the plaintiff became aware that the ore was lying as waste on the Nickel Plate dump, it knew it was valueless to it or anyone else in that position, and therefore has suffered no damage by any act of the defendant in regard thereto.

In the third place it is alleged that the defendant company unlawfully permitted and permits a large body of water to accumulate in its mine whereby is caused an undue flow of water into the plaintiff's mine.

This raises a difficult question of fact which must be determined before the cases cited can properly be considered. The difficulty in arriving at a satisfactory conclusion is, however, lessened by the view already expressed that the defendant cannot be held responsible for the trespass workings as such, nor has it ever made any use of them. The onus of proving that the maintenance of a column of water in the defendant's shaft caused an increased flow into the plaintiff's mine is upon the plaintiff, but though this should be clearly established I feel bound to say that generally speaking, the evidence in support of the allegation is not of that precise and definite nature which would be expected, and while it is often plausible and theoretical it is likewise often far from convincing. The evidence of Davis and Jenkins does establish the fact that there was within the dates mentioned an increased flow of water into the Centre Star mine, but they must go further than that and show that this increased flow came from the defendant's workings.

In the face of much that is vague and theoretical regarding real and supposed natural seams and channels, there is this clearly established and striking fact that when the water had ceased flowing into the Centre Star mine on the 24th of June it was perhaps 10, but not more than 20 feet below the Nickel Plate 200 foot level, and some 180 feet above the highest point of the trespass workings from which it is alleged the water escaped into the Centre Star mine, chiefly at its 400 foot level, which is on a slightly higher plane than the Nickel Plate corresponding level. On this peculiar fact the defendant's counsel not unnaturally enlarges, and contends that unless water can be proved to flow up-hill his client is clearly not responsible for its

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presence in the Centre Star, and that it must have got into that mine through theretofore unsuspected natural seams and fissures from undiscovered sources. This is undoubtedly the salient fact in the case, and it must be grappled with and satisfactorily explained, for in the face of it, it is not sufficient to rely on the mere coincidence, singular though it is, that the Centre Star, theretofore a dry mine, did not become wet till after the Nickel Plate shaft was allowed to fill up. The plaintiff's counsel on the argument at the trial was unable to solve the problem, nor have I been able to do so after a further close consideration of the evidence. Such being the case, I can only find that the basic fact on which this branch of the action must stand or fall has not been established.

In case it may be thought material, should the matter go further, and as a matter of precaution, I find that the bulkheads were in every way well and properly constructed to perform the functions expected of them. And in regard to the water in the trespass workings, I think it proper to say that I place most reliance on the evidence of Thompson, who has a better knowledge and experience thereof than any other witness.

The action must be dismissed with costs.

Action dismissed with costs.

NOTE.—This case is out of its chronological order because it was held back from the printer in the expectation that the judgment of the Full Court on the appeal (argued on Nov. 15-16, 1904, before Hunter, C.J., Duff and Morrison, JJ.) would have been delivered ere now, but illness has prevented that being done.

For measure of damages where ore has been negligently abstracted, see *Last Chance Mining Co., Ltd.*, v. *American Boy Mining Co., Ltd.*, *ante*, p. 150.

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BYRON N. WHITE CO., LTD. v. SANDON WATER WORKS CO., LTD.*

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Sandon Water Works Act, B. C. Stat. 1896 ch. 62—Permission to Divert Water—Pleading—Condition Precedent—Onus of Proof—Expropriation—Presumption—Trespass—Damages, Nominal—Laches—Acquiescence—Costs—Appeal Successful on Point not Taken Below.

The owner of a Crown-granted mineral claim is entitled to the surface rights thereof as against one who has not a better title.

The owner of a Crown-granted mineral claim has such rights therein that in general he is entitled to an injunction against a company which enters prematurely thereupon to carry out a work authorized by statute. But in the special circumstances of the present case he was left to bring an action in trespass or ejectment to establish his rights.

Where an appeal is allowed on a point of law not taken at the trial or in the water and construct necessary works upon the lands of others, subject to the prior approval of its plans and sites by the Lieutenant-Governor in Council, such approval is a condition precedent to its right to divert water and enter and take permanent possession of lands for the purpose of utilizing such water.

Under the special act in question it was not a condition precedent that payment or tender should be made before entry for either survey or permanent acquisition.

Mere submission to an injury, such as the entry and erection of a building on one's land by a stranger for any period short of that limited by statute for the enforcement of the right of action, does not amount to acquiescence in the trespass. To constitute laches there must have been some equivocal conduct inducing the erection.

Rule 168 relating to the pleading of conditions precedent refers to contracts and not to cases where a party relies upon non-compliance with a statute.—KILLAM, J., dissenting.

Where an appeal is allowed on a point of law not taken at the trial or in the notice of appeal, but open on the pleadings, it is not in strictness successful, and no costs of it will be allowed; but as the appellant should have succeeded at the trial, he will be allowed the costs thereof.

Principle upon which injunctions will be granted in cases of expropriation considered.

Decision of the Supreme Court of British Columbia varied.

Statement.

APPEAL by defendant from a judgment of the Full Court of the Supreme Court of British Columbia, reversing the judgment of IRVING, J., dismissing the plaintiff's action for damages for trespass and for a mandatory injunction compelling defendant to remove from plaintiff's premises a water tank and pipe line.

The defendant company was incorporated by Cap. 62 of the British Columbia Private Acts of 1896, sec. 9 whereof is as follows:

9. The company is hereby authorized and empowered to take and divert from Tributary Creek, Saw Mill Creek, Carpenter Creek (South Fork, below the point of diversion of the water supply for the Reco mines and Noble Five

*Partly reported in 10 B. C. 361, and 35 S. C. 309.

†*Present*—SEDGEWICK, GIROUARD, DAVIES, NESBITT and KILLAM, JJ.

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mines concentrators), and from Sandon Creek (below the present concentrating works of the Slocan Star mine), at such point or points as it shall judge suitable and desirable, and to appropriate and use for the purpose of generating electricity, so much of the waters of the said creeks as the Lieutenant-Governor in Council may allow, with power to the company to construct all works that may be necessary for making such water power available, and from time to time to improve such water privilege by erecting dams, diverting the waters of the said creeks into any channel or channels, constructing any raceways or other works which may from time to time be required in connection with the improvement or maintenance of the said water privileges hereby granted; and for the purposes aforesaid the company, its workmen, servants, and agents are empowered and authorized to enter into and upon any lands in the vicinity of any of the said creeks, and in the Town of Sandon, and Sandon Addition, No. 1, of any person or persons, bodies politic or corporate, to survey, set out, ascertain and take, expropriate, hold and acquire such parts thereof as it may require for the purpose of obtaining the said water power or for the construction of any dam, raceway, flume, channel or other appliances for the purpose of increasing the water power to the extent aforesaid, or for the erection of power-houses and generating plants: Subject, however, to making compensation thereof in manner hereinafter mentioned; but the powers (other than the powers to enter, survey, and set out and ascertain what parts thereof are necessary for the purposes aforesaid, or for making the plans hereinafter mentioned) conferred by this section shall not be exercised or proceeded with until the plans and sites of the said works have been approved by the Lieutenant-Governor in Council.

Under said Act the company installed a water works and electric light system for the Town of Sandon, and its works were constructed on Lots 754 and 590, Group 1, Kootenay District. Lot 754 (otherwise known as the Wyoming mineral claim) was Crown-granted on 26th January, 1898. Before this the ground was covered by conflicting claims, the Wyoming and La Planta locations, the latter being the plaintiff's location. By agreement of 1st June, 1897, made between the plaintiff and the owners of the Wyoming, it had been agreed that the Crown grant should be issued for the Wyoming location and the ground divided between the claimants, and the plaintiff got the portion subsequently occupied by defendant's works. In pursuance of this agreement, the plaintiff's interest in the La Planta location was allowed to expire on 27th October, 1897. Lot 590 was held by the plaintiff under Crown grant as a mill site, and part of the defendant's works was on this ground. In 1897 the defendant was engaged in constructing its works, and in September of that year was building a flume which Bruce White, who was the plaintiff's general manager, thought would probably be extended to plaintiff's lands, and as he was going away he left instructions with a book-keeper to notify the defendant if it did come on to plaintiff's ground that its entry would be a trespass, and on his return in December the book-keeper reported to him that defendant had come on to plaintiff's ground, and that when it did so he told its representative that it was a trespasser; this notification was probably given in October, and when White returned the works had been completed.

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Defendant's superintendent of construction stated in his evidence that when the pipe line was laid he was aware it had gone on to plaintiff's ground.

For that purpose of its undertaking the defendant diverted water from Sandon Creek, but it was not proved that it had obtained permission from the Lieutenant-Governor in Council to do so, although it did get the plans and sites of the works approved on 25th March, 1902.

In December, 1901, plaintiff made a claim against defendant for rent, and in February, 1902, its solicitors gave defendant notice of intention to bring an action, and the writ was issued on July 16th, 1902. The defendant pleaded its special act as a justification, and also acquiescence and waiver, and that the plaintiff could not object to the defendant's possession because the plaintiff held the lands in question as a Crown-granted mineral claim only, the Wyoming, which conferred no surface rights. In reply the plaintiff alleged non-compliance with two conditions precedent of the said act, (1) failure to obtain approval of the plans and sites, and (2) failure to give notice to treat; or obtain consent of the Chief Commissioner of Lands and Works under sec 25*.

The action was tried at Nelson on 27th October, 1903, before IRVING, J.

Argument.

John Elliot and *Lennie,* for plaintiffs.

S. S. Taylor, K.C., for defendants.

28th October, 1903.

Judgment at trial, IRVING, J.

IRVING, J.: The defendants were incorporated by private Act on the 17th of April, 1896, to construct an electric light works and a water works. By their Act, sec. 9, they were not at liberty to exercise the powers conferred by the Act or proceed thereunder until the plans and sites of said work had been approved by the Lieutenant-Governor in Council. Notwithstanding this provision in their Act, they did proceed with the works, taking possession of the property in dispute in the fall of 1897, and erecting an electric light plant in the town of Sandon to supply that place.

Prior to the date of March, 1902—25th March, 1902—when they took possession of the land in dispute, the plaintiffs had no title to that part which is now called the Wyoming property. Their interest under the La Planta record had expired on the 22nd of October, 1897. Apparently it was after this that Mr. Bruce White left the camp and the defendants went on and took possession. No proof is furnished

*Immaterial.

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me that there was any objection raised to their going there, although Mr. Bruce White says he received a report from his manager that he had objected. If there was any objection made I have no idea what its nature was; it certainly was not followed up with any correspondence, nor was it renewed by Mr. Bruce White on his return, or by Mr. Oscar White when he became superintendent. In fact no objection was taken until the spring of 1902. In the meantime the defendants had incurred very great expense, and I think the plaintiffs are guilty of laches. I think they stood by and permitted the defendants to go on and incur expense.

Now the plaintiffs bring this action for an injunction and damages. It is quite apparent that what they wish to do is to remove the defendants off this ground in order to take advantage of its favourable situation—to enable them to erect there a mill of their own. That injunction cannot be granted, because the defendants are now in a position by virtue of the permission obtained from the Lieutenant-Governor in Council to take possession of that property. Since that date, the 25th of March, I mean, they are rightly in possession of this property.

I am unable to find that the plaintiffs suffered any real damage prior to the 24th of March, 1902.

In my opinion the action has been misconceived; the plaintiffs should have appointed an arbitrator and have proceeded in that way to determine the value of the property taken away from them. The action is dismissed with costs.

Action dismissed with costs.

Appeal to FULL COURT.

The plaintiffs appealed to the Full Court, and the appeal was argued at Vancouver on 19th April, 1904, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Argument.

Bodwell, K.C. (*Lennie* with him), for appellants: The onus of shewing that they had complied with the provisions of the statute was on defendants; until they obtained permission to divert water, they are trespassers: see *The Mayor, &c., of Liverpool* v. *Chorley Water-Works Co.* (1852), 2 De G. M. & G. 852 at p. 859. [*Taylor*: This point was not taken at the trial or in the notice of appeal. *Lennie*: A great deal of discussion took place at the trial on proof required under sec. 9 generally, and diversion of water.]

The evidence shews defendants were notified they were trespassers when they ran the pipe line on to the plaintiffs' ground; apart from the warning, they knew they had crossed to plaintiffs' ground as appears from the evidence of defendants' superintendent in charge of the construction. The trial Judge overlooks the fact that the work defendants were engaged on had all been accomplished before

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plaintiffs' head officers were aware of it; there had been no such acquiescence or laches on the part of plaintiffs as to disentitle them to relief: see *De Bussche* v. *Alt* (1878), 8 Ch. D. 286 at p. 314; *Wilmott* v. *Barber* (1880), 15 Ch. D. 96 at p. 105; *Fullwood* v. *Fullwood* (1878), 9 Ch. D. 176 at p. 179, and *Archbold* v. *Scully* (1861), 9 H. L. Cas. 360 at p. 387.

S. S. Taylor, K.C., for respondents: The Water Works Company is a *quasi* public institution; by the Act the Company is empowered to get a certain amount of water from certain creeks as a matter of right, subject only to the right of the Lieutenant-Governor to restrict it to the use of what is necessary and proper. Before going on with the works it was not necessary to get the permission to divert. The plaintiffs did not take the position at the trial that we had not obtained permission to divert water, and they should not be allowed to take it now. Plaintiffs were aware our works were going on; they stood by and allowed us to expend money, and under such circumstances a Court of Equity will not lend its assistance by granting a mandatory injunction. As to acquiescence, see Ewart on Estoppel, 34; Bigelow, 660; Addison on Torts, 7th Ed., 91 and 92; *Parrott* v. *Palmer* (1834), 3 Myl. & K. 640; *Brmingham Canal Co.* v. *Lloyd* (1812), 18 Ves. 515. In any event our tank is on the Wyoming claim, which is Crown granted, and it only carries mineral and not surface rights.

(*Per* CURIAM: By the judgment of this Court in *Spencer* v. *Harris* (1899), 1 M. M. C. 294, as against the Crown grantee of a mineral claim, you are merely a squatter and must move off. He has some proprietary rights at least, but you have none at all. It is perhaps not easy to say exactly what those rights are, but you so far have no status to attack them.)

Bodwell, in reply: As to our right to a mandatory injunction see *Smith* v. *Smith* (1875), L. R. 20 Eq. 500 at p. 504; Kerr on Injunctions, 4th Ed., 733; *The Directors, &c., of the Imperial Gas Light and Coke Co.* v. *Broadbent* (1859), 7 H. L. Cas. 600 at p. 612; *Cowper* v. *Laidler* (1903), 2 Ch. 337; *Goodson* v. *Richardson* (1874), 9 Chy. App. 221 at p. 224; *Baxter* v. *Bower* (1875), 44 L. J. Ch. 625, and *Durell* v. *Pritchard* (1865), 1 Chy. App. 244 at p. 250.

Judgment of FULL COURT.

HUNTER, C.J.: The Court is unanimously of the opinion that the appeal should be allowed. This is a common law action of trespass by the Byron N. White Co. against the Sandon Water Works and Light Co. The Water Works Company were entitled to go upon the lands and do what they did under the powers given by their Act, provided they complied strictly with the conditions imposed, because that was their only authority for interfering as they did with the

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property of the plaintiffs. It was not shewn at the trial that the Lientenant-Governor in Council had authorized the diversion of the water, and that in my opinion was a preliminary essential or a condition precedent to the exercise of the power of interfering with the soil of the plaintiffs.

It is not necessary to decide on this occasion whether the authority of the Lieutenant-Governor to divert the water was a condition precedent to the right of entry, but it certainly was a condition precedent to the right of interference with the soil of the plaintiffs. It was open on the pleadings of the plaintiffs to take advantage of any failure of proof by the defendants of their case, and although the attention of the learned Judge was not directed to the fact that there was no proof that the authority of the Lieutenant-Governor in Council to divert the water had been obtained, I do not think that precluded the plaintiffs from taking advantage of the point of law, especially as this is a Court of re-hearing.

As to the defence raised on the ground of laches, it is quite clear that there was no laches which would raise any equity on behalf of the defendants. If we were to hold on the facts which are before us on this occasion that there was laches which precludes the plaintiffs from enforcing their legal rights, we would wipe out the Statute of Limitations. To raise an equity in favour of the defendants in such circumstances as appear here, it would have to be shewn that they were induced to make the expenditure they did by some equivocal conduct on the part of the plaintiffs. It is quite clear they were not in any way misled when they entered on the property, and they have only themselves to thank for the consequences. I think only nominal damages ought to be allowed—say $10—and I think the right ought to be further aided by the issue of a mandatory injunction, not to be drawn up however for six months, in order to enable the parties if possible to come to some understanding.

As to the costs: the appeal, in strictness, is not successful, as the defendants are defeated on a ground not taken at the trial or in the notice of appeal. Therefore, while the plaintiffs should have succeeded at the trial and therefore should have the costs of the action, there should be no costs of the appeal.

Appeal allowed without costs—Appellants to have costs of the trial.

Appeal to S.C.

The defendant appealed to the Supreme Court of Canada and the appeal was argued on the 19th and 20th of October, 1904.

Argument.

E. P. Davis. K.C., and *S. S. Taylor. K.C.*, for the appellants. The plaintiffs allege that defendants did not file plans nor serve notice of expropriation. But having obtained the order in council

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approving the plans and site after being some years in possession, it should be presumed that all necessary preliminaries had been observed. They claim, also, that defendants could not enter without first making payment, but that is not a condition precedent under their Act of incorporation. See *Harding* v. *Township of Cardiff* (1881), 29 Gr. 308; *Stonehouse* v. *Township of Enniskillen* (1872), 32 U. C. Q. B. 562. Moreover the plaintiffs acquiesced in such possession—*Kelsey* v. *Dodd,* 1881, 52 L. J. Ch. 34; *Sayers* v. *Collyer* (1884), 28 C. D. 103 at pp. 106-8. Plaintiffs could not set up violation of one condition after pleading that of two others only—*Collette* v. *Goode* (1878), 7 C. D. 842.

E. V. Bodwell, K.C., and *Lennie* for the respondents: Performance of the conditions alleged in plaintiffs' reply is an essential preliminary to defendants' right to interfere with the premises—*Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602; *North Shore Railway Co.* v. *Pion* (1889), 14 App. Cas. 612. Defendants could not take possession without making compensation—*Harding* v. *Township of Cardiff* (1881), 29 Gr. 308. Defendants did not ask for consent of plaintiffs to their entry and cannot rely on acquiescence—*Fullwood* v. *Fullwood* (1878), 9 Ch. D. 176; *Willmott* v. *Barber* (1880), 15 Ch. D. 96, at p. 105; *Archbold* v. *Scully* (1861), 9 H. L. C. 360. Mandatory injunction is the proper remedy—*Smith* v. *Smith* (1878), L. R. 20 Eq. 500, at p. 504; *Goodson* v. *Richardson* (1874), 9 Ch. App. 221, at pp. 223, 227; *County of Welland* v. *Buffalo and Lake Huron Railway Co.* (1871), 31 U. C. Q. B. 539; Kerr on Injunctions, 4th Ed. p. 33.

Cur. adv. vult.

21st November, 1904.

Judgment.

SEDGEWICK, J.—I concur in the judgment allowing the appeal, in part, without costs, and ordering that the judgment appealed from should be varied by refusing the injunction for the reasons stated by my brother Killam.

GIROUARD, J.

GIROUARD, J., agreed with Mr. Justice Nesbitt.

DAVIES, J.

DAVIES, J.—I have given much consideration to this case, and have had the additional advantage of reading the conclusions reached by my brothers Nesbitt and Killam. I concur in the disposition of the appeal proposed by my brother Nesbitt, and in the reasons given by him.

NESBITT, J.

NESBITT, J.—The plaintiffs, a mining company, brought an action of trespass against the defendants, the Sandon Water Works and Light Company.

The defendants are incorporated under a special Act of the legislature of British Columbia, ch. 62, of the statutes of 1896.

The plaintiffs are the owners of a mill site near Sandon, B.C., on lot 590, and also part of the Wyoming Mineral Claim, lot 754, lying to the east of Sandon Creek, and allege that the defendants wrongly went upon their land in 1897, and built a tank and pipe line.

The action was commenced on the 16th of July, 1902, and is for damages for trespass and a mandatory injunction compelling the defendants to restore the land to its former condition.

The defendants pleaded the private Act I have mentioned, and that they went upon the land under the authority of the private Act and with the full knowledge and consent, or in the alternative, with the acquiescence of the plaintiffs; and also claimed that the Wyoming, being a mineral claim, the plaintiffs have no surface rights on the same, and the possession of the defendants did not interfere with the rights of the plaintiffs.

The plaintiffs replied setting up failure upon the part of the defendants to comply with certain conditions in the private Act, which they claimed were conditions precedent to enable the defendants to obtain any right or privilege under the private Act. The plaintiffs did not reply another alleged condition precedent upon which the judgment in the Court in appeal proceeded, the learned Chief Justice saying:—

> It is not necessary to decide, on this occasion, whether the authority of the Lieutenant-Governor to divert the water was a condition precedent to the right of entry, but it was certainly a condition precedent to the right of interference with the soil of the plaintiff. It was open on the pleadings to the plaintiff to take advantage of any failure of proof by the defendants of their case, and although the attention of the learned Judge was not directed to the fact that there was no proof that the authority of the Lieutenant-Governor in Council to divert the water had been obtained, I do not think that precluded the plaintiff from taking advantage of the point of law, especially as this is a Court of rehearing.

The defendants in this court objected to the course which was taken in the Supreme Court of British Columbia, relying upon rule 168, which provides that:

> Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleadings by the plaintiff or defendant (as the case may be) and, subject thereto, an averment of the performance or occurrence of all conditions precedent, necessary for the case of the plaintiff or defendants, shall be implied in his pleadings.

I think that this rule rather has reference to contracts than to cases such as this, where the party relied upon the statute as justifying his action, and that in such a case it would not be necessary for the plaintiff to reply as was done here, but as he has seen fit to do so and thereby not only not drawing attention to something he relies

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upon but perhaps misleading the defendant, he was properly punished by the court below by being deprived of his costs in appeal.

To deal then with the various defences raised, I think that the plaintiffs have shewn that they are entitled to the use and possession of all the property in dispute. The other questions involved are more difficult.

I think that the authority of the Lieutenant-Governor in Council to divert the water is a condition precedent to the expropriation of lands for the purpose of utilizing the water so alleged to be diverted, and in this I agree with the court below. I think, however, it would be most unsatisfactory to have the rights of the parties ultimately determined upon what at present appears before the court. Counsel strenuously argued upon the one side that it was for the defendant to shew that such an order in council existed; and upon the other side it was argued that the defendants owing to the course of the pleading had a perfect right to assume that this was not the question, and pointed to the order in council which approved of the plans and site as shewing that when such order was issued some years after the works were erected, the Lieutenant-Governor in Council had issued an order in council approving of the plans and site, had before them the affidavit shewing that the company had continuously from 1897 to March, 1902, been using the water, and shewing the various works in use, and that, therefore, it should be presumed that all necessary consents of all public authorities of the province were given. If this case is to be determined upon that point I think the facts would appear rather to justify such presumption, but, in the view that I take, I think that the proper course is to refuse an injunction and leave the parties to their respective rights, the plaintiffs, if they are so advised, to bring trespass or ejectment, and the defendants to take immediate proceedings to expropriate, when it can be properly determined whether they have complied with the necessary conditions precedent to enable them to expropriate, and if they have not, no doubt plaintiffs will, upon making a proper case, be entitled to have their rights protected and recover possession of their property.

The next question for consideration was whether payment or tender of the money was a condition precedent to taking of possession. The private Act relied upon is very difficult of construction. There is no doubt that the rule is plain that parties shall not be deprived of the use and possession of their property before payment, unless by express words or necessary implication in the statute conferring rights of expropriation.

I have examined, in addition to the cases mentioned by the parties, a number of authorities, including *Boyfield* v. *Porter* 1811), 13 East, 200; *Doe dem Robins* v. *Warwick Canal Co.* in 1836 (1836), 2 Bing.

N. C. 483; *Lister* v. *Lobley* (1837), 7 A. & E. 124; *Earl of Harborough* v. *Shardlow* (1840), 7 M. & W. 87; *Peters* v. *Clarson* (1844), 8 Scott N. R. 384; *Johnson* v. *Ontario, Simcoe & Huron Railway Co.* (1853), 11 U. C. Q. B. 246, and I have come to the conclusion that, on the true construction of this Act, the making of compensation is not a condition precedent to the taking possession.

It will be observed that looking at clause 9 the power is to

> survey, ascertain, set out, and take, hold, appropriate and acquire * * * * (subject, however, to making compensation therefor in manner hereinafter mentioned.)

And had that been the only language used in the Act I would have held it was necessary to make compensation before taking possession. But the statute then proceeds:

> The powers (other than the powers to *enter, survey, set out and ascertain* * * * *) conferred by this section, shall not be exercised or proceeded with until the plans and sites are approved of.

It will be seen that while the surveying, setting out, ascertaining, taking, etc., are all grouped together (subject to making compensation), they are dissevered when you come to the necessity of obtaining the approval of the plans and site, which is clearly a condition precedent, and as it could never be intended for the mere purposes of surveying, etc., there should be payment as a condition precedent, I take it that the legislature by necessary implication put surveying and expropriation on the same footing as to payment, since it joined all these processes in speaking of payment, and therefore payment is not a condition precedent to the taking possession of the land either to survey or take. The legislature has clearly stated that expropriation cannot take place until the plans and site are approved of, and apparently imply when such approval is given that then possession may be taken subject to making payment and either party can set the law in motion for obtaining payment. I refer also to clause 13 as indicating that in the case of clearing lands and underwood it is plain that payment is to follow the work.

I am unable to derive any light upon the subject from a consideration of clauses 22 and 23 relied on by Mr. Davis. Much argument was devoted to the question of acquiescence as affecting the granting of the injunction. Even assuming the court below was right in holding that the right to divert was a condition precedent, compliance with which was necessary by the plaintiff, in the view I take of the case that the injunction should not go on the present record, it is perhaps unnecessary to discuss the point, but as the same question has arisen more than once recently, I desire to say that in cases where a legal right is established the general rule is that laid down in *Goodson* v. *Richardson* (1874), 9 Ch. App. 221, viz.: that where the invasion

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of the right is for the purpose of a continuing trespass which is in effect a series of trespasses from time to time to the gain and profit of the trespasser, without the consent of the owner of the land, this is a proper subject for an injunction. See also *Cowper* v. *Laidler* (1903), 2 Ch. 337, where the rules to date are stated by Buckley, J.

Where, however, the case is one in which the party trespassing would, if proper steps had been taken, have the right to expropriate, I think the better course is to withhold the issue of the injunction in order to enable the necessary steps to be taken and payment made. See *West* v. *Parkdale* (1887), 12 App. Cas. 601, pp. 613-15-16; *Pion* v. *North Shore Railway Co.* (1889), 14 App. Cas. 612, pp. 629-30; *Welland* v. *Buffalo and Lake Huron Ry. Co.* (1870), 30 U. C. Q. B. 147.

There is another class of case in which it may be that an injunction will not be granted even where the legal right is proved, viz.: where there has been acquiescence practically amounting to a fraud upon the defendant. See as an example the observation of Lord St. Leonards in *Gerrard* v. *O'Reilly* (1843), 3 Dr. & War. pp. 414-433; and see rules expressly laid down by Fry, L. J., in *Wilmott* v. *Barber* (1880), 15 Ch. D. 96, pp. 105-06.

As it is the duty of the court to decide upon the rights of the parties, and the dismissal of the bill upon the grounds of acquiescence amounts to a decision that a right which has once existed is absolutely and forever lost, (see per Turner, L. J., in *Johnson* v. *Wyatt* (1863), 2 DeG. J. & S. 18, 18-25), I would hesitate to say the court could refuse the injunction at the trial were legal right established unless in case of fraud. See also *Smith* v. *Smith* (1875), L. R. 20 Eq. 500, at pp. 504-505, per Jessel, M.R. Had the case been clearly proved here I think an injunction should have gone, the order not to issue if within a limited time the defendants had put matters in train for expropriation, but in view of the doubt whether the defendants can now put themselves in position to expropriate I would allow the appeal so far as an injunction is concerned, but as the defendants could have applied to the court for a suspension of the order to enable them to set the proceedings for expropriation in order, and also have failed in their argument that the authority to divert was not a condition precedent, I think there should be no costs to either party and both should be left to their remedies which I have pointed out.

The order should be to vary judgment below by refusing the injunction.

KILLAM, J.

KILLAM, J.—If, as found by the Supreme Court of British Columbia, no objection was made at the trial to the want of strict proof of a formal order in council authorizing the defendant company to

divert and use the water of the creeks mentioned in the statute, I do not think that the absence of such proof should have been allowed to be set up on appeal. It is possible that upon the point being raised the evidence could have been supplied. See *Eyre* v. *Highway Road* (1892), 8 Times L. R. 648; *Page* v. *Bowlder* (1894), 10 Times L. R. 423; *Graham* v. *The Mayor, etc., of Huddersfield* (1895), 12 Times L. R. 36; *Kennedy* v. *Freeth* (1863), 23 U. C. Q. B. 92; *Armstrong* v. *Bowes* (1862), 12 U. C. C. P. 539; *Procter* v. *Parker* (1889), 12 Man. Rep. 528; *Hughes* v. *Chambers* (1902), 14 Man. Rep. 163.

The defendant company, for over four years, operated its works through and over the plaintiff company's lands and used the waters of the creeks for the purpose. With notice of this, the Lieutenant-Governor in Council approved of the plans of the works. The plaintiff company had no interest in the waters, which were vested in the Crown, and no right other than that of an ordinary citizen to object to any allowance by the executive of their diversion and use. The plaintiff company, by its pleadings, expressly set up several conditions precedent to the defendant company's right to take and use the plaintiff's lands under the statute, but not the absence of authority to use the water. It appears to me that it was proper to assume that any necessary formal authority for the use of the water had been given.

In *The North Shore Ry. Co.* v. *Pion* (1889), 14 A. C. 612, where the company had built its railway along the fore-shore of a river, cutting off the plaintiff's access to the water, although, as appears by the reports of the case in this court (1887), 14 S. C. 677, and in the courts of Quebec (1886), 12 Q. L. R. 205, the formal authority to the railway company to use the shore was neither set up in the pleading nor directly proved, Lord Selborne, in delivering the judgment of the Judicial Committee of the Privy Council, said:

> Their Lordships do not in this case proceed upon the assumption that the consent of the Lieutenant-Governor in Council of Quebec was not duly given to the use made by the railway company of the foreshore of the river St. Charles for the construction of their works. If it were necessary to determine that point, the facts would appear to their Lordships rather to justify the presumption that all necessary consents of all the public authorities of the Province were given.

And in the *Corporation of the County of Welland* v. *The Buffalo and Lake Huron Ry. Co.* (1870), 30 U. C. Q. B. 147; (1871), 31 U. C. Q. B. 531, it was presumed, from the use of a railway company for a number of years of a strip of land of the Crown and its crossing, near by, of a canal for which the authority of the Governor in Council was required, that the company had obtained the authority of the Governor in Council to so use the land.

No evidence of the want of authority was given at the trial and no motion was made against the judgment of the trial court on

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evidence of the want of such authority in fact. While it is claimed in the respondents' factum that, upon the argument in the Full Court, the defendant company conceded that the Lieutenant-Governor in Council had not allowed, granted or approved of the diversion of the water, this does not appear in the printed case; and the judgment of the court did not proceed upon any such admission, but upon the supposed want of evidence in that respect.

Upon careful perusal of the various statutes of British Columbia relating to the diversion and use of the natural waters, and of the appellant company's Act of incorporation, I am of opinion that the payment of compensation was not a condition precedent to the right to enter upon and use the plaintiff company's lands. Under the Land Act, C. S. B. C. (1888) c. 66, ss. 39 to 52, payment of compensation in advance was expressly required in the cases in which parties were thereby authorized to acquire the right to divert and use water and to enter and use the lands of others for the purpose. Under the Water Privileges Act, 1892, 55 Vict. ch. 47 (B.C.), it was necessary to obtain the authority of a judge in order to enter upon and use the lands of others. The judge ascertained the compensation in advance and could impose such terms as he thought fit respecting payment or security.

Under The Water Clauses Consolidation Act, 1897, 60 Vict. ch. 45, R. S. B. C. ch. 190, the power to enter upon, use or expropriate the lands of others was to be governed by The Lands Clauses Consolidation Act, 1897, 60 Vict. ch. 20, R. S. B. C. ch. 112, which expressly required payment of or security for compensation before entry, except for the purposes of surveying, taking levels, etc.

By the appellants' Act of incorporation, 59 Vict. ch. 62, s. 9, the company was authorized to enter into and upon the lands of other parties.

> to survey, set out, ascertain, and take, expropriate, hold and acquire, such parts thereof as it may require, etc., subject, however, to making compensation therefor in manner hereinafter mentioned, but the powers (other than the powers to enter, survey, and set out and ascertain what parts thereof are necessary for the purposes aforesaid, or for making the plans hereinafter mentioned) conferred by this section shall not be exercised or proceeded with until the plans and sites of the said works have been approved by the Lieutenant-Governor in Council.

It will be noticed that, in this section, the portion beginning "subject, however," applied to surveying, setting out and ascertaining, as well as to taking, expropriating, holding and acquiring. If then, this portion should be interpreted as expressing a condition precedent, it would be applicable to entry for the purpose of surveying and ascertaining the parts to be taken, as well as to the permanent acquisition and use of the property. It is usual in such Acts to allow, as

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in The Lands Clauses Act just referred to, entry for the purpose of surveying and ascertaining the land to be taken without previous compensation, which cannot well be estimated until the land has been ascertained. This Act authorized either the company or the owner to initiate arbitration proceedings to fix the compensation. By section 22 the owner was bound to convey upon payment or tender of the compensation. By section 23

> the lands, rights and privileges which shall be ascertained, set out and appropriated by the said company for the purposes aforesaid, shall, so long as the said company use the same for the purposes of this Act, be vested in the said company.

By section 9 one condition precedent was expressly imposed for the permanent acquisition of the land, and to that it was expressly limited. It seems, then, not unreasonable to construe the Act as not imposing the payment of compensation as a condition precedent for any purpose, except for formal conveyance.

As the approval of the plans was an express condition precedent to the right to appropriate and use the plaintiff company's lands, and as the plans were not approved until long after the appellant company had taken possession and appropriated the lands, there was clearly a trespass for which the plaintiff company was entitled to recover. But after the approval of the plans the appellant company remained rightfully in possession.

In my opinion, the portion of the judgment appealed from awarding an injunction should be struck out, and the respondent company should pay the costs of the appeal.

Appeal allowed, in part, without costs.

NOTE.—For other cases on water rights, see the next case, and *Centre Star Mining Co., Ltd.* v. *City of Rossland*, *ante*, p. 27, and note thereto.

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BROWN ET AL. v. SPRUCE CREEK POWER CO., LTD.

FULL COURT.

Placer Mining Water Rights—Water Clauses Consolidation Act—Grant of Water Record and Joint Application for—Status to Attack—Mining Jurisdiction of County Court—Concurrent Jurisdiction—Gold Commissioner and Powers of to Reduce or Modify Water Record—Appeal—Mine-owner and Layman—Placer Mining Act, Part X.

The County Court has jurisdiction over water rights appurtenant to placer claims.

Though such jurisdiction is concurrent with that of the Supreme Court it is not ousted by the mere fact that an action was begun in the Supreme Court by the same parties respecting the same subject matter before it was begun in the County Court, and if no objection is taken it will continue to exercise its jurisdiction.

If objection is taken the proper course is to apply to stay one of the actions, and it depends upon the circumstances which one will be stayed.

It is too late to object to the jurisdiction after judgment.

A layman is a leaseholder and may apply for a water record; which is appurtenant to the mine and not to the miner.

No one has a status to attack a water record who has not got one himself, or what is equivalent to one under the Act: a right to water under sec. 29 confers such a status.

Individual miners working on the same creek who have statutory rights in the same water may join in an application for a record, or to reduce or modify an existing record which is being misused to their disadvantage, and on such application the Gold Commissioner may make such adjudication as seems to him just; and unless those interested who participated in or properly had notice of the proceedings appeal from his decision in the summary way provided by sec. 36, they are bound by it.

If the action taken by the Gold Commissioner was the proper one it is not invalidated because he gave wrong reasons or relied on one section instead of another which authorized his action.

Decision of HENDERSON, Co. J., affirmed.

Statement.

APPEAL by defendant company from a judgment of the County Court of Vancouver, Mining Jurisdiction, directing the company to allow 600 miner's inches of water to pass its intake for the benefit of other placer miners in working their claims. The case was tried at Atlin by His Honour Judge Henderson, on the 1st, 2nd, 3rd and 5th days of September, 1904.

The plaintiffs were three of many individual placer miners working claims on Spruce Creek, Atlin Mining Division, and using its water in close succession for that purpose. All the water in the creek was recorded and under sec. 29* of the Water Clauses Consolidation Act, as amended in 1904, ch. 56, sec. 2, said placer miners were entitled to a continuous flow of 90 inches through their claims. The defendant company was the assignee of the water record of one

*Given in the judgment.

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Banon, No. 92, dated 26th August, 1903, for "1200 inches of water "out of the unrecorded and unused water in Spruce Creek, if and "when there is any." There were prior to this record certain other valid records, one No. 15, in favour of Martin, for 300 inches; another, No. 83, in favour of Queen, for 100 inches; another, No. 37, in favour of Crumback, for 600 inches; and another, No. 73, in favour of Sageman, for 300 inches. Before the grant to Banon, on the joint application† of one Storey and many of the said individual miners, said records Nos. 37 and 73 had been reduced by the Gold Commissioner by written decision duly recorded, dated 10th August, 1903, by 200 and 100 inches respectively, in all 300 inches, in favour of the individual miners as a class, without apportionment. At the foot of Storey's application the Gold Commissioner made this note: —

"Granted the use of 300 miner's inches from records 37 and 73 thus—from No. 37, 200 inches; from No. 73, 100 inches—until individual claims, both Creek and Bench, are either worked out or abandoned. They pay therefor the sum of $6.33, which they may pay to the Mining Recorder for application upon the rentals of Nos. 37 and 73. The said 300 inches to revert to the said records unless otherwise apportioned by the Gold Commissioner.

(Sgd.) J. A. F."

On the 24th August, 1904, the defendant company received written notice from the Gold Commissioner ordering it to allow sufficient water, estimated at 600 inches, to pass its intake to provide for prior interests, but it refused to do so, hence this action.

The other material facts will be found in the judgment.

Argument.

Woods and *Kapelle* for plaintiffs.

Belyea, K.C., for defendant.

Cur. adv. vult.

September 5th, 1904.

Judgment at trial, HENDERSON, Co.J.

Per CURIAM: I stated that in this case I expected to reach a conclusion by this morning. I may say now I have come to the conclusion that my judgment must be in favour of the plaintiffs, but the injunction should be drawn so as to avoid the complications suggested by Mr. Belyea—that is, that the defendant company should not be prevented from using the water in case of abandonment by the plaintiffs, or other cause, entitling the defendant to the use of the water in the absence of an injunction in this matter.

I award no damages, but the plaintiffs will have the costs of the action, and as there will in all probability be an appeal from my

†Sec. 16. On any dispute arising prior to record, priority of notice of application shall constitute priority of right.

Sec. 17. A record shall speak from the day on which it is made.

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judgment, I intend to give my reasons* later on, but it will be, of course, at as early a date as possible. I deliver judgment now, as I understand that both parties are very anxious for a decision, and I think it is advisable in cases of this kind to give the decision at the very earliest date; but in any event, the conclusion I have reached represents my most careful consideration of the facts and of all that has been urged on both sides.

The costs will be on the Supreme Court scale (sec. 140, Placer Mining Act).

Judgment accordingly.

On the first day of the trial, on the preliminary question of the Mining Jurisdiction of the County Court, His Honour had given the following ruling:—

Judgment at trial, HENDERSON, Co. J.

Per CURIAM:—As to that, the view I take of it is that the Placer Mining Act confers a certain jurisdiction and an enlarged jurisdiction upon the County Court, and by reading section 137 you will see the force of my reasoning.

Now, that statute means, although it does not say so in express terms, that it is to a large extent a summary jurisdiction. If that is so, it seems to me that the object of the Act was to enable litigants to have their disputes terminated in the shortest possible manner, and in a summary manner, and also in a sense to leave with the Court the discretion largely as to how that dispute should be heard, because in another section—section 138—it says: "In all mining actions or suits the Court may decide the question at issue upon the ground in dispute, and such decision shall be rendered as in ordinary cases, and shall have the same effect as rendered in an ordinary Court." If that means anything, it means that the Court has the power conferred upon it of visiting the ground and settling the dispute, quite apart from the question of pleadings at all.

It seems to me it was intended by the Legislature that the Court, in settling mining disputes, shall first to the best of its endeavours make an effort to settle that dispute in the shortest possible manner —on the ground if necessary. So my view of the points raised is that technical objections will not prevail if I am convinced that there is a good ground for dispute, and for that reason I am disinclined to give effect to your technical objections unless I see that some grievous harm has been caused, or some injury done to the party who is raising those objections.

Now, I have not the slightest doubt that, laying aside for a moment Mr. Belyea's objection as to the plaint not disclosing a cause

*NOTE.—None were given.

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of action—I have not the slightest doubt that this Court has jurisdiction in a case of this kind. Take into consideration the interpretation of the term "mining property." After explaining what placer claims mean, section 2 goes on to say, "and in the term 'mining property' shall be included every placer claim, ditch or water right used for placer mining purposes, and all other things used in connection therewith or in the working thereof." That is intended to be very wide and include every possible form or phase of mining property, and clearly it seems to me that this Court would have jurisdiction in the case under consideration.

Objection over-ruled.

Appeal.

The defendant appealed and the appeal came on to be heard by the full Court at Victoria on January 11th, 12th and 13th, 1905, before HUNTER, C.J., MARTIN and MORRISON, JJ.

Argument.

Belyea, K.C., for the appellant: As to jurisdiction the County Court has none now in mining cases since the Water Clauses Consolidation Act, which is a complete code on the subject; by sec. 154 (*b*) is repealed the former water jurisdiction under secs. 54, and 56 to 78 of Part IV. of the then existing Placer Act of 1891, and the present Placer Act, Part X., sec. 133, has had left out of it the former sec. 156 (*q*) of 1891, which gave jurisdiction in "all suits relative to water rights claimed under this Act . . . . "; the intention is clearly to abolish that branch of jurisdiction.

Further, an action between the same parties on the same issues was begun in the Supreme Court before this action, and that has the effect of ousting the jurisdiction of the County Court, for the Court which was first seized of it retains it to the exclusion of all others.—Enc. of Pleading and Prac. (1898), Vol. 12, pp. 151-2.

(*A. D. Taylor,* for respondent: You did not take this objection below and it is too late now; though the record does show you took the former objection to the jurisdiction.)

Belyea: The record should show it, for the point was raised, and I put in the Supreme Court proceedings in evidence for that purpose.

(*Per* CURIAM: You must show that you clearly directed the attention of the Court to the question—nothing in the record shows that you did so.)

These individual miners, I admit, have rights under sec. 29, but have no record and hence no status to attack our admittedly valid record, Banon's for 1200 inches. Plaintiffs cannot invoke the records of other parties, in which they have no interest, to attack ours. I do not attack the Harrison and Queen records or the Martin record, but the plaintiffs are strangers to them. The Gold Commissioner should not have even received the joint application of Storey *et al.*, being

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different owners of distinct claims, which is not authorized by the Act: *Centre Star Mining Co.* v. *Brit. Col. South. Ry. Co.* (1901), 1 M. M. C. 460; 8 B. C. 214. With the exception of Smaill, who I admit had a recorded interest as part owner, the plaintiffs were only laymen on the claims of other owners, and only recorded mine owners can apply for valid records under secs. 10* and 19†. The evidence shows, in any event, that there was ample water for the plaintiffs, all that they were entitled to use. The Gold Commissioner had misconceived his powers in attempting to grant a record to these individual miners as a class under sec. 18,‡ or in granting something

*10. Every owner of a mine may secure the right to divert unrecorded water from any stream or lake for any mining purpose, or other purposes incidental thereto, or for milling, concentrating or other purposes in connection with the working of his mine, to an amount reasonably necessary therefor, upon obtaining a record thereof in manner hereinafter provided.

† 19. (Given in the judgment).

‡ 18. Any owner of land or owner of a mine who would be entitled to apply for a record of the water in any stream or lake, if the same were unrecorded, and who is desirous of obtaining a record of the same but is prevented, wholly or in part, by the existence of prior records, whether obtained under this or any other Act, may apply *ex parte* to the Commissioner, or Gold Commissioner, for leave to apply for a record, notwithstanding the existence of such prior records, and upon the furnishing to such Commissioner, or Gold Commissioner, of *primâ facie* proof that the water allowed to be diverted by any or all of such existing records is wholly, or in part, unused thereunder, or unnecessary for, or in excess of the requirements of the purposes specified therein, such Commissioner, or Gold Commissioner, shall, by writing under his hand, authorize such owner to give notice of his intention to apply, and to apply, for a record of the water of such lake or stream, and such owner may thereupon apply for a record accordingly, and shall post up and forward notice of his application, and proceed therein in form and manner hereinbefore provided for the making of an application for a record of unrecorded water.

(2.) The Commissioner, or Gold Commissioner, in adjudicating upon the application of such owner, shall, after hearing all parties in interest and their witnesses, if any, or, if any party in interest do not appear, upon its being proved to his satisfaction that such party has had notice of the terms of such application and of the date and time on which it is made, either refuse the application, or, where it is proved to his satisfaction that he is justified in making a cancellation or reduction as hereinafter mentioned, grant a record for such amount of water as, in his discretion, is reasonably necessary for the purposes specified in the application, and may, for the adjustment of the supply of available water, cancel any existing record obtained under this Act, or any Act hereafter to be passed, on the ground of abandonment or non-user, and reduce any such existing record in part, either as to the amount of water or as to the times of using such water, where it is proved to his satisfaction that the amount of water thereby recorded is in excess of the amount required for the purposes specified in the record, or that such water is necessary for such purposes only during certain periods, and may during the intervals be applied to other purposes, and may:

(3.) In respect of any existing record obtained under any Act heretofore passed, in respect of which *primâ facie* abandonment or non-user, in whole or in part, is proved to his satisfaction, grant to the applicant an interim record entitling the applicant to the use of the water comprised in such existing record, in whole or in part, until the owner of such existing record, upon giving notice of his intention in that behalf at the time and in manner fixed by the Commissioner (to be not less three months' notice in any case) shall, if entitled by law so to do, *bonâ fide* resume under his original record the use of the water comprised in such interim record, or such

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"in lieu of a record" which the statute also does not warrant; the only record he can grant is that directed by sec. 15*; there was no formal decision on record from which we could appeal.

A. D. Taylor, for respondents: Do you wish to hear me, my Lords, on the question of jurisdiction?

(*Per* CURIAM: No.)

Then as to Banon's record, under which defendant claims: it is, on its face, subject to the rights of all prior record holders, *e. g.*, Martin's and Queen's as well as Nos. 37 and 73 after reduction. We have a statutory status equivalent to a record under sec. 19, and can attack the defendant's or any other conflicting record. In the circumstances it was proper for all individual miners to join in the application to protect their rights, and the Gold Commissioner acted lawfully in imposing new conditions on existing records to meet the case. His order for 600 inches, in view of prior records, was the only one that could have been made, for the evidence shows that was the least quantity that would be sufficient and there was no appeal from his decision and therefore it must stand—sec. 36.† We ask that our rights should be protected against adverse claimants—sec. 140.‡

part thereof as he may reasonably require, to be ascertained by the Commissioner, or Gold Commissioner; and the rights of the holder of the interim record shall, at the expiration of the period fixed in such notice, and in respect of the water therein specified, absolutely cease and determine, and he shall have no claim or right to compensation for any loss or damage caused to him by such resumption of use under the original record.

* 15. The record granted upon such application shall be forthwith entered by the Commissioner, or Gold Commissioner, in the Book of Record of Water Rights, and shall contain the particulars required to be contained in the notice of application as confirmed by or modified upon the adjudication and any other particulars directed to be inserted therein by Regulations in that behalf, with such additions and variations as circumstances may require:

2. A certified copy of the record shall be furnished by the Commissioner, or Gold Commissioner, to the applicant, and shall, without proof of the signature of the Commissioner, or Gold Commissioner, be evidence in all courts and proceedings of the matters in such record set forth:

3. The Gold Commissioner shall forthwith forward a certified copy of every record made by him to the Mining Recorder of the district or place in which the water comprised in such grant is to be used, and the Recorder shall, without fee, transcribe such copy into his Book of Record of Water Rights.

† 36. Any person affected by any decision of a Commissioner, or Gold Commissioner, under this Part of this Act, may appeal therefrom to the Supreme Court or to the County Court in a summary manner by filing, within one month after the day such decision is rendered, a petition as hereinafter provided:—

(*a*.) The appeal shall be in the form of a petition to any Judge of the Supreme Court, or the Judge of the County Court appealed to, verified by affidavit, and setting forth the matters and points of fact and of law relied upon: (Sub-secs. (*b*) to (*f*) follow.)

‡ 140. In any action or suit for determining the rights of adverse claimants to records of unrecorded water and for the protection of rights to the use of and records of unrecorded water, and generally in any action or suit for determining the right to divert and use the water of any stream or lake, the plaintiff may join as defendants all persons diverting and using or claiming

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The remedy given by sec. 145* is not appropriate or convenient in the circumstances.

Cur. adv. vult.

27th February, 1905.

The judgment of the Court was delivered by

MARTIN, J.:—As regards the first point respecting the jurisdiction of the County Court I see no reason to reverse His Honour Judge Henderson or to depart from the recent judgment of Mr. Justice Duff, delivered September 17th, 1904, in *Spruce Creek Power Co. Ltd.*, v. *Muirhead et al., ante,* p. 158, 11 B. C. 68, wherein he held that the County Court has jurisdiction in actions of this kind under sec. 133, sub-sec. (4), and also under sub-sec. (1) of the Placer Mining Act.

It is also contended that even if the County Court has concurrent jurisdiction with the Supreme Court in this action under said sec. 133, and also sec. 143, yet because an action was begun on the same issue in the Supreme Court, between the present defendant as plaintiff, and the present plaintiffs and others as defendants, eight days before the present action was brought in the County Court, therefore the jurisdiction of the latter Court is ousted; and counsel cites the

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the right to divert and use the water of such stream or lake, and the Court may, in one judgment, settle the relative priorities and rights of all the parties to such action:

(2.) When in any such suit or action damages are claimed for the wrongful diversion of water, the same may be assessed and apportioned by the jury in their verdict, or the Court in its judgment, and judgment may be entered for or against one or more of several plaintiffs or defendants, and the Court may, in its judgment, determine the ultimate rights of the plaintiffs as between themselves, and of the defendants as between themselves:

(3.) In any action or suit concerning joint water records or rights, or joint rights in water ditches, or other works for the conveyance of water, unless partition is claimed in the action, the Court shall hear and determine the action or suit as if such records and rights were several as well as joint.

* 145. The Chief Commissioner, and every Commissioner and Gold Commissioner shall have power to enforce compliance with the provisions of this Act, and with all rules and regulations from time to time in force thereunder, and for the purpose of enforcing such compliance may give notice in writing to any municipality, company or person contravening, or refusing, or neglecting to carry out any of the provisions of this Act, or of any rule or regulation in force thereunder, requiring immediate compliance with such provision, rule, or regulation, as the case may be, and if such municipality, company, or person neglect or refuse to comply with the demands and directions in such notice contained, or any of them, the water rights and records and all privileges and priorities in connection with or appurtenant thereto, of the municipality, company or person so neglecting or refusing shall, at the option of the Lieutenant-Governor in Council, upon proof to his satisfaction of such neglect or refusal, as aforesaid, be forfeited and absolutely cease and determine, or may continue to be held and enjoyed by such municipality, company, or person, upon such terms and subject to such conditions as the Lieutenant-Governor in Council may by Order in Council declare and impose.

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following extract from the Encyclopædia of Pleading and Practice (1898), Vol. 12, pp. 151-2:—

"It is a settled rule that when two Courts have concurrent jurisdiction over a particular subject matter, the one which first takes cognizance of a cause falling thereunder will retain the jurisdiction throughout to the exclusion of the other, and until final determination . . . This rule rests upon comity and the necessity of avoiding conflict in the execution of judgments by independent Courts, either of distinct or concurrent jurisdiction. Any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results."

Now, in the first place the parties in the two actions are not the same, because there were nine defendants in the Supreme Court action instead of the three now before us, and the American authority relied on, at p. 152, shows that in order to apply it "the suits should be between the same parties, seeking the same remedy, and apply to the same question." But further than this, our practice is different, and it is, that though the jurisdiction exists yet the proper course is to apply to stay one of the actions. In the Encyclopædia of the Laws of England, article "Staying Proceedings," Vol. XI., p. 724, it is stated that:

"If concurrent actions are pending, say, in the High Court and the County Court, or any other Court in this country, raising the same issues, the maxim *Nemo bis vexari debet in eadem causa*, applies, and the Court, will, as a rule, allow the action which was commenced first to proceed, and stay the other (but see *Thomson* v. *S. E. Ry. Co.* (1882), 46 L. T. 513); unless, indeed, a decree has already been made in either action, in which case that decree will stand, but the conduct of the proceedings will be given to the plaintiff who first issued his writ. . . . ."

And in addition to the authorities cited, see *Wedderburn* v. *Wedderburn* (1840), 2 Beav. 208. In *Thomson* v. *S. F. Ry. Co.* it was held by the Court of Appeal that there was no hard and fast rule as to which action would be stayed and that the Court would exercise its discretion on the facts before it. Other authorities will be found collected in the Annual Prac., 1905, Vol. 2, p. 429; and Yearly Prac., 1905, pp. 38-9.

Speaking generally it would seem to be clear that either of two courts having jurisdiction will continue to exercise it till objected to.

As between conflicting County Courts in this Province where the property is in different jurisdictions, sec. 136 provides that the Court "before which the dispute is first brought shall decide it."

By means of the special and simple procedure of its mining jurisdiction the County Court is enabled to try mining disputes much more speedily that the Supreme Court. Sec. 137 provides that:—

"The hearing of any summons, plaint, or other process in any County Court shall not be deferred beyond the shortest reasonable time necessary, in the interests of all parties concerned, and it shall be lawful for the Registrar to make summonses or other proceedings returnable forthwith, or at any other time."

And sometimes it is of the first consequence to the litigants to get judgment as soon as possible, otherwise heavy loss would follow, of

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which this very case is an instance in point, and this feature would have much weight in an application to stay. But the defendant at the trial herein, instead of objecting to the celerity of the proceedings, objected to any delay therein (A. B. 184), and pressed the learned Judge for an early decision (A. B. 189). In such circumstances it is too late to complain of a want of jurisdiction on this head: *Gelinas* v. *Clark* (1901), 1 M. M. C. 428; 8 B. C. 42; and see *Ex parte Pratt* (1884), 12 Q. B. D. 334, *per* Bowen, L. J., at p. 341.

In this question of jurisdiction the recent decision of Mr. Justice Duff in *Muirhead* v. *Spruce Creek Power Company, Ltd.*, delivered on September 13th, 1904, *ante*, p. 155; 11 B. C. 1, should be considered; it is to the effect that a mining action in the County Court may, under sec. 34 of the County Courts Act, be stayed pending trial in the Supreme Court.

Then as to the second point that no one has a status to attack a water record unless he holds a water record himself, this is the view of the learned Judge as expressed in the case cited, thus:—

"In order to acquire a status to complain about the diversion of water any subject—be he free miner or otherwise—must acquire a water record, as the Water Clauses Consolidation Act now stands. My view is that the Act constitutes an exclusive code on the subject of water rights in this Province. . . . . No person not having such a record in my judgment has any status whatever in a Court to make any complaint about the misuse of water by the holder of a record."

Subject to what follows I see no reason, at present at least, to differ from his Lordship, interpreting his language in the sense that one who seeks to attack a record under that Act must also have a status thereunder. Such a status is especially given to placer miners in certain circumstances by sec. 29 of the Water Clauses Consolidation Act as amended in 1904, ch. 56, sec. 2, as follows:—

"29. In any case where all the water in any stream has been recorded for mining purposes and placer mines, either before or after the date of such record, are located and *bonâ fide* worked either above or below the point of diversion, the owner or owners of such placer mines shall be entitled to the continuous flow in said stream past, or to divert into or upon or through, such mine or mines sixty inches, if two hundred or less be diverted by such record, and ninety inches if three hundred inches be diverted by such record, but no more; and such owner or owners shall be entitled to the full use of such water for such distance above or below such mine or mines as shall be necessary for the continuous and economical workings of said mine or mines and the carrying away of tailings and debris arising therefrom: Provided, however, that such owner or owners may divert a greater quantity than above specified upon paying to the holder of said record compensation for the damage he may thereby sustain; and in computing such damage the costs of the ditch shall be considered."

It is admitted that the plaintiffs are free miners working on the creek in question and entitled to invoke this section, and their counsel contends that its effect is to confer upon them a statutory record for the specified number of inches, in this case 90, without the necessity of any application, and that consequently they have a statutory status to attack the holder of any record who is misusing the water granted

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to him, or failing to comply with the conditions of his record to their disadvantage. I am clearly of the opinion that this is the case (see secs. 7,* 18, 28†, 140, and definition of "Unrecorded Water,"§) and that sec. 29, where it applies, is intended to prevent the necessity of a multitude of applications being made for small amounts of water, and that any one who is entitled to invoke the section is in the same position as if he held the customary written record for the amount of water allowed him by the section. And I agree with my brother Duff that the whole Act is intended to be "the rock of defence, both to the small proprietor and the individual miner against anything in the nature of a misuse or a monopoly of the water."

The third objection is that the application of Storey and other individual miners on that creek should not have been even entertained by the Gold Commissioner, and reliance is placed on the language of Mr. Justice Drake in an appeal from a decision of my own under this Act in the matter of the *Centre Star Mining Co.* v. *Brit. Col. Southern Ry. Co.* (1901), 1 M. M. C. 460; 8 B. C. 214; wherein the Full Court upheld my view that a joint application could be made by two distinct companies being the owners of two different lode mines which were not adjoining. On the actual point at issue the case when properly understood is really an authority against the appellant who now invokes it, because the judgment of the Full Court says that:—

"If more persons join in an application than the law contemplates, or if some of the uses for which the water is to be put are not in his opinion correct, he (the Commissioner) has power to make the record, omitting those matters which are in his opinion incorrect, just as much as he has power to limit the amount of water to be used, etc., etc."

It is true the learned Judge goes on to say (p. 464) that:—

"The intention of the Act, it appears, from a general view of its provisions, is that any mine owner or number of mine owners interested in one claim may apply, or owners of a group of mines under control of one company or partner-

* 7. Every right, power, and privilege conferred by and acquired under this Act shall be subject to and conditional upon the reasonable use for the purposes for which such right, power, or privilege is conferred and acquired:

(*a.*) Provided that a mortgagee or encumbrancer shall, notwithstanding abandonment or non-user on the part of the mortgagor, under his mortgage or encumbrance, hold all records and water rights appurtenant to the lands or mine charged for such period as may be reasonable to enable him to realize his security, and the question of what is a reasonable time shall, in each case, be a question of fact dependent on the special circumstances, and to be determined by the Commissioner or Gold Commissioner.

† 28. Every holder of a record shall take all reasonable means for utilizing the water granted to him, and if he wilfully waste any water or take a quantity of water in excess of his actual requirements, the Commissioner, or Gold Commissioner, may, upon notice, cancel or reduce the record or impose all necessary conditions.

§ "Unrecorded water" shall mean all water which for the time being is not held under and used in accordance with a record under this Act, or under the Acts repealed hereby, or under special grant by Public or Private Act, and shall include all water for the time being unappropriated or unoccupied or not used for a beneficial purpose.

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ship, may join in an application, but not several owners or separate and distinct mines with no proprietary connections; if such a course was allowed, very great difficulty might arise. Without enumerating such difficulties it is sufficient to say that in my view such a proceeding was not in contemplation of the framers of the Act, which was to enable the waters of the Province to be separated for the use of all miners and not to be absorbed for scattered miners under one application."

But it must be remembered that he is speaking only of applications relating to lode claims, and that considerations of a very different sort apply to this case where there are a number of individual placer miners on the same creek, who not only have peculiar rights under said section 29, but have one paramount interest in common, viz.: to secure a continuous supply of water which they are using in close succession one after the other during the short season in which their claims can be worked. Miners so operating do not come within the proper meaning of the term "scattered miners," as employed by my brother Drake, and indeed in one sense they have a common "proprietary connection" of a special and vital kind in the water of the stream under and by virtue of said section 29. Though from one point of view their claims may be "separate and distinct mines," yet their common interest and the operation of the section may serve to connect them in such a way that it will often be found impossible to "disconnect" them when considering the best means to practically apply the statute; it all depends on the varying circumstances which the Gold Commissioner will have to deal with on the spot.

I am of the opinion, therefore, that the Gold Commissioner acted properly in the circumstances in entertaining the joint application of Storey and the other individual miners concerned, who, in fact, made their application in that manner at the suggestion of the Gold Commissioner (A. B. 16). I do not see how he could have acted otherwise, for, as has been seen, these men were already in effect holders of statutory records and entitled to attack existing records and have them cancelled, reduced, or imposed with new conditions, under secs. 18 and 28, if they showed good cause therefor. Indeed, it facilitated matters and gave the Gold Commissioner a freer hand to have them all before him in the one interest. And it was also proper to hear the three conflicting applications of Banon, Smaill and Storey *et al.*, at the same time, for sec. 18 requires him to "hear all parties in interest and their witnesses," and make his "adjudication" thereon. He did hear all the parties and the course he adopted in provisionally reducing record No. 37 by 200 inches, and record No. 73 by 100 inches, a total of 300 inches, in favour of the individual miners as a body until their claims were worked out or abandoned, seems to have been the only practical way of dealing with the matter. It is objected that this does not constitute a grant of a record in their favour, but, as has been seen, they were already in the position of record holders by statute, and all that it was necessary to do in such case to guard

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their rights was to amend or modify the existing records by attaching new conditions thereto. An interim record could not have been granted under sub-sec. (3), for that only applies to records "obtained under any Act heretofore passed," and all the records in question had been granted under the existing Act. The reduction was made, and either sec. 18 or 28 would justify the step taken, and the Gold Commissioner took the precaution of immediately sending copies of his adjudication to the Mining Recorder, to the Chief Commissioner of Lands and Works and to each of the parties (A. B. p. 55), so that all concerned had express notice thereof. Nothing more is required to be done even in the case of a new grant: see sec. 15, sub-sec. (3).

It was, perhaps, strictly speaking, incorrect for the Gold Commissioner to say in his decision that "the said 300 inches shall be considered as *granted* in response to the said application of Thomas Storey and others in *lieu of a record,* and as appurtenant to the individual claims above designated," yet if the action taken was the proper one on the ground that the individual miners already had statutory grants, it will not be invalidated because the official used inapt language or erred in thinking he had power to make a grant "in lieu of record," which is something the statute does not authorize. The point is, that what he did in reducing the two records was lawful though apparently, and very excusably, he did not appreciate the exact rights or status of the individual free miners in the circumstances.

In addition to the said 300 inches there was also another record, No. 15, Martin's, for 300 inches, which was admittedly prior to Banon's, and this made in all 600 inches which the plaintiff company must allow to pass its intake, and on the 24th of August, 1904, with the apparent intention of implementing his adjudication of August 10th, 1903, as amended on August 25th of the same year, the Gold Commissioner ordered the defendant to allow that amount to pass its intake, which it refused to do, and hence this action. This order is not in the appeal book as it should be, though it is referred to in the plaint in par. 8, and was twice referred to at the trial and was cross-examined on and discussed by plaintiff's counsel (A. B. pp. 51, 138), and the measurements directed to be made under it also discussed: Mr. Belyea says it was in the form of a letter, but that he cannot recollect its terms. However, there is no dispute about its general effect as above stated, though we are in the dark regarding the exact circumstances which led up to its being made. But it is not necessary to consider it further, for it does not carry the case beyond the original adjudication and is only supplementary. Having given, then, his formal adjudication and placed it on record, it was open to any one who felt aggrieved thereby to take that appeal "in a summary manner" to a Judge of the County Court or of this Court, that sec.

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36 provides, *i.e.*, by filing a petition "within one month after the day such decision is recorded." It is difficult to understand why the defendant company, or its predecessor in title, did not adopt this course, if it was not satisfied with the decision, but since it has not seen fit to do so it is bound by it.

On the facts it is clear, from even the defendant's own witnesses, that 600 inches are not too much to allow to pass the intake for the use of the various prior interests concerned, and the decision of the trial Judge should be affirmed on that ground also. If less than that amount had been allowed the individual miners would not get their 300 inches, for, in addition to the prior Martin record for 300 inches, one Queen also had an admittedly valid prior one, No. 83, for 100 inches, which he was using.

It was argued by Mr. Belyea that the holder of a lay on a claim could not apply for or obtain a water record, and that only a recorded owner of land or a mine could do so. Sec. 10 declares that—"Every owner of a mine may secure the right to divert unrecorded water from any stream or lake for any mining purpose . . . . " Sec. 18 declares that—

> "Any owner of land or owner of a mine who would be entitled to apply for a record of the water in any stream or lake if the same were unrecorded," may get leave from the Gold Commissioner to apply therefor, "notwithstanding the existence of such prior records. . . .

The term "owner of a mine" is thus defined:—

> "'Mine' shall include 'claim' and 'mineral claim,' and shall mean any land held or occupied under the provisions of the mining laws of the Province, for the purpose of winning and getting therefrom minerals, whether precious or base, and whether held in fee simple or by virtue of a record or lease, and 'owner of a mine' shall mean owner of a mine as above defined."

Now, a "layman" is really a leaseholder and an occupant of a claim within the meaning of that definition, the peculiar feature of his tenure being that the amount of the rent he pays is contingent since it depends upon the clean up, and he is bound to work the claim continuously in a miner-like manner during the mining season. The claim cannot be worked without water, and therefore after getting his lay his first duty to his lessor as well as to himself must be to get a water record, if one is not already appurtenant to the claim by statute or otherwise. For this purpose he must, from the very nature of a lay, be deemed, in the absence of evidence to the contrary, to represent the owner as well as himself, and therefore is entitled, without further authority, to apply for a record to the claim, if it be necessary to do so. There is nothing restricting the right to recorded owners merely, and it would be surprising to find such restriction, for the record is not made appurtenant to the applicant, but to the mine according to sec. 19:—

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"19. Every record obtained by the owner of land or the owner of a mine shall be deemed as appurtenant to the land or mine in respect of which such record is obtained:

(2.) All assignments, transfers, or conveyances permitted by law of any mine or of any pre-emption rights, and all conveyances of land in fee, whether such assignments, transfers, or conveyances were or shall be made before or after the passing of this Act, shall be construed to have conveyed and transferred, and to convey and transfer, any and all recorded water privileges appurtenant to the premises assigned, transferred or conveyed, and shall pass with any of the premises aforesaid upon devise or descent."

And by sec. 20, the record exists only so long as the mine does:—

"20. Whenever a mine shall have been worked out or abandoned or a pre-emption cancelled or abandoned, or whenever the occasion for the use of the water upon the mine or pre-emption shall have permanently ceased, all records appurtenant thereto shall be at an end and determined."

In sec. 29 the expression "owner of such placer mines" is clearly intended to include a layman; to seriously contend otherwise, bearing in mind the way placer mining operations are carried on, seems to me to be impossible.

Some discussion arose on the proper form of a water record, and it is strange that one is not given in the Act, which gives rise to some uncertainty on the point, for while the Interpretation Section says that "Record" shall "mean an entry in some official book kept for that purpose," yet sec. 15 contemplates something more formal, for it provides that:—

"The record granted upon such application shall be forthwith entered by the Commissioner, or Gold Commissioner, in the Book of Record of Water Rights, and shall contain the particulars required to be contained in the notice of application as confirmed by or modified upon the adjudication and any particulars directed to be inserted therein by Regulations in that behalf, with such additions and variations as circumstances may require."

But from the course the appeal has taken it is unnecessary to decide the point here, and I merely draw attention to it so that it may receive consideration in the proper quarter. It is true that a printed form has been adopted in practice, but we are informed it is not authorized by rule of the Lieutenant-Governor in Council under sec. 142, for none has been made.

On the whole case I am unable to discover any good reason why the Judgment of the learned trial Judge should be disturbed, and therefore the appeal must be dismissed with costs.

NOTE.—For other cases on the Water Clauses Consolidation Act, see *ante*, pp. 27, 79, 135, and the preceding case.

For an appeal under sec. 36, see *In re Water Cl. Con. Act, Centre Star Mining Co. v. Brit. Col. Southern Ry. Co.* (1901), 1 M. M. C. 421.

It will be useful to give here for reference a form of Grant of Water Rights, and of Agreement for a Placer Mining Lay, two of the exhibits in this action:—

WATER CLAUSES CONSOLIDATION ACT, 1897.

No. 84

Grant of Water Right for Mining Purposes.

Granted this second day of March, 1903, to Albert H. Garrison, of Discovery, in the Atlin Mining Division.

Free Miner's Certificate No. B4895.

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FULL COURT.

Two hundred (200) inches of water out of the unrecorded and unused water of Spruce Creek, in the Atlin Mining Division aforesaid.

Such water is to be used for placer mining by use of sluices and water wheel on the following mine or lands, viz.: on the Hardscrabble and Fellows bench placer claims, Nos. 85 and 88 below Discovery, respectively, on the north bank of Spruce Creek aforesaid, and is to be diverted from its source at a point at bench claim No. 76 below Discovery, on the north bank of Spruce Creek, and is to be returned at a point at bench claim No. 88 below Discovery, on the north bank of Spruce Creek.

Work as contemplated under sec. 23 of the Water Clauses Consolidation Act to be commenced not later than the 15th day of May, A.D. 1903.

The difference in altitude between the point of diversion and the point where it is returned is about 25 feet.

Three hundred (300) inches of water out of Spruce Creek, in the Atlin Mining Division, District of Cassiar, British Columbia.

Such water is to be used for hydraulic mining purposes on the following mine or lands, viz.: on the Gorgon hydraulic bench lease claim, and is to be diverted from its source at a point about claim No. 80 below Discovery on Spruce Creek aforesaid, and is to be returned at a point about claim No. 170 below Discovery on Spruce Creek aforesaid.

The difference in altitude between the point of diversion and the point where it is returned is about 200 feet.

It is intended to store or divert the water by means of dam, ditches and flumes.

The annual rental, payable on or before the 30th June in each year, is $5.00.

Dated this 6th day of September, 1901.

(Signed) J. D. GRAHAM,
Gold Commissioner.

18th August, 1904.

FORM OF PLACER MINING LAY.

THIS AGREEMENT, made this 15th day of May, A. D. 1902, on Spruce Creek, Cassiar Mining District, Province of British Columbia, between S. J. Marquis, party of the first part, and Frank Linton and Louis Betteker, parties of the second part, witnesseth:

(1) That the party of the first part agrees to let to the parties of the second part, and the parties of the second part agree to take, to work on a lay, that certain creek placer claim known as the Fellows placer claim situate on Spruce Creek, about two miles below Discovery.

(2) That the said parties of the second part agree to work the said claim in a miner-like fashion continuously till the close of the season, to do all labor and pay all expenses in connection with the operation of said claim.

(3) For and in consideration hereof the said parties of the second part are to receive seventy-five per cent. of the total gold output of said claim for the season, and the balance of twenty-five per cent. is to be paid to the party of the first part, each of the parties to stand royalty on same according to their percentages; the division of the gold to be made at each clean-up at which party of the first part may be present.

(4) Any and all improvements made on the said claim by the parties of the second part shall become the property of the party of the first part, and shall not be removed from said claim.

(5) That the parties of the second part agree not to sublet the claim to any third party.

WILLIAM FITZGERALD.

(Sgd.) S. J. MARQUIS.
" FRANK LINTON.
" LOUIS BETTEKER.

APPENDIX A.

(V. P. 112.)

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The Attorney-General for British Columbia v. *The Wellington Colliery Company.*

December 10, 1904.

Present—LORD MACNAGHTEN, LORD LINDLEY, SIR FORD NORTH, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

This was a petition by the Attorney-General on behalf of the Government of British Columbia for special leave to appeal from a judgment of the Supreme Court of British Columbia on the question, which had been referred to it by the Lieutenant-Governor under section 98 of the Supreme Court Act (1897), whether rule 34 of sec. 82 of ch. 138 of the Revised Statutes of British Columbia, 1897 (the Coal Mines Regulation Act), as amended by sec. 2 of ch. 17 of the statutes of 1903, so far as it related to the employment of Chinamen, was within the competence of the Provincial Legislature.

The Attorney-General for British Columbia (the Hon. *Charles Wilson*) appeared in support of the petition; Mr. *Asquith*, K.C., for the Wellington Colliery Company.

Rule 34 of the Coal Mines Regulation Act as amended is as follows:—

The petition for special leave to appeal stated that after the passing of the rule the Wellington Colliery Company (Limited) (among others) in a mine subject to the Act, employed Chinamen below ground contrary to the rule, contending that the rule, so far as it related to the employment of Chinamen, was unconstitutional. The Attorney-General reported to the Lieutenant-Governor of British Columbia that it was contended that the rule was unconstitutional and that it was desirable that the question of its validity should be settled as quickly as possible. On December 9, 1903, pursuant to the report and under the powers conferred by sec. 98 of the Supreme Court Act, the Lieutenant-Governor, by and with the advice of his Executive Council, ordered that it be referred to the Full Court of the Supreme Court of British Columbia for hearing and consideration whether the rule as re-enacted was within the competence of the Legislature of British Columbia to enact in so far as it provided that no Chinaman should be appointed to or should occupy any position of trust or responsibility in or about a mine subject to the Coal Mines Regulation Act, whereby through his ignorance, carelessness, or negligence, he might endanger the life or limb of any person employed in or about such mine, viz.: As banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer, or be employed below ground, or at the windlass of a sinking pit. On December 23, 1903, the question so referred came on for hearing and consideration before the Full Court, composed of the Chief Justice, Mr. Justice Irving, and Mr. Justice Martin. The judgment of the Court was given on April 18 last, by which it was held (Mr. Justice Martin dissenting) that the question referred to the Court must be answered in the nega-

tive. There was no appeal to the Suprme Court of Canada from the judgment of the Suprme Court of British Columbia on a reference under section 98 of the Supreme Court Act. The question whether the rule, so far as it related to the employment of Chinamen, was unconstitutional was of great and general importance in British Columbia, and it was in the public interest that the question should be finally settled. The petitioner, the Attorney-General, desired, on behalf of the Government of British Columbia, to have the judgment of the Full Court reviewed by His Majesty in Council for the purpose of having it finally determined whether the enactment of the rule was within the powers of the Legislature of British Columbia.

Mr. *Asquith*, K.C., opposed the petition, and, in the course of his argument, contended that the matter was absolutely concluded by a decision of the Board in a case heard before it some time ago.

Lord Macnaghten remarked that the contention of the Attorney-General was that the matter was not concluded by that decision.

Mr. *Asquith* observed that the rule was amended by inserting the word " or be employed below ground." He went on to mention a case in which an inspector, finding a Chinaman underground in a mine, took proceedings for a conviction under the rule. The conviction, however, was quashed by the British Columbia Court. If the question was to be brought before the Board at all it ought to have been done by an appeal in connection with that case.

At the close of the arguments on Thursday,

Lord Macnaghten intimated that their Lordships would humbly advise His Majesty to grant special leave to appeal. Their Lordships thought that the Attorney-General ought to give an undertaking to abide by any order as to costs which the Board might think fit to make.

The Attorney-General assented.

Lord Macnaghten also said that, in accordance with the usual practice, notice must be given to the Attorney-General for the Dominion of Canada so that he might intervene if he thought fit.

(Extract from The " Times," London, December 12, 1904)

APPENDIX B.

MINING STATUTES.

Since the statutes, etc., re-printed in Vol. 1, Appendix A., ending at p. 857 (which includes those passed in 1902), the following have been enacted and should be added to the Table of Proclamations and Statutes at p. 531, Vol. 1:—

1903, June 4.....(Chap. 5)....."Bureau of Mines Act, 1895, Amendment Act, 1903."

" May 4.....(Chap. 17)....."Coal Mines Regulation Act Further Amendment Act, 1903."

" May 4.....(Chap. 18)....."Department of Mines Act, 1899, Amendment Act, 1903."

" Dec. 12.....(Chap. 37)....."Coal Mines Act Amendment Act, 1903." (of Vol. 1903-4).

1904, Feb. 10.....(Chap. 38)....."Coal Mines Regulation Act Amendment Act, 1903" *(sic.)*

" Feb. 10.....(Chap. 39)....."Coad Mines Regulation Act Amendment Act, 1904."

" Feb. 10.....(Chap. 40)....."Coal Mines Regulation Act Further Amendment Act, 1904."

None of these Acts is re-printed for the reason given in Vol. 1, p. 535. Wherever any particular section of them has been referred to in the report of any case it has been printed therein.